IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2011CD00038

BETWEEN	**BABA LIMITED**	**CLAIMANT/RESPONDENT**
AND	**WEST BEST FOODS JAMAICA LIMITED**	**DEFENDANT/APPLICANT**

IN CHAMBERS

Mrs. Melissa Cunningham-Cuff instructed by Paris & Company for the Defendant/Applicant

Mr. Demetrie Adams instructed by Tavares-Finson Adams for the Claimant/Respondent

Heard: June 9 and 23, 2020

Civil practice and procedure — Application to set aside default judgment in default of defence — Whether conditions for setting aside default judgment are satisfied - Rule 13.3 of the Civil Procedure Rules 2002 as amended - Overriding objective

PALMER HAMILTON, J

BACKGROUND

[1] On the 27th day of May 2011 the Claimant Company (hereinafter referred to as "The Respondent") by way of Claim Form and Particulars of Claim sought damages against the Defendant Company (hereinafter referred to as "the Applicant") for the following-

I. Breach of contract;

II. Loss of user profits in the sum of Two Million and Ninety Thousand Nine Hundred and Twenty-Five United States Dollars (US$2,090,925.00);

III. The refund of Forty-Seven Thousand United States Dollars (US$47,000.00) with interest at 1% above the commercial rate.

[2] The Applicant filed an acknowledgment of service but failed to file a defence within the prescribed time. On the 30th day of July 2012, after hearing Attorneys-at-Law for the Applicant and the Respondent, judgment was entered against the Applicant on the issue of liability and an Order was made for damages for breach of contract and interest to be assessed. This gave birth to the Applicant's action of filing an Application to set aside the judgment in default of defence.

THE APPLICATION

[3] The Application sought the following orders: -

> 1. *That the default judgment entered herein against the Defendant on the 30th day of July be set aside.*
> 2. *That the Defendant be at liberty to file its Defence and Counterclaim in answer to the Claim herein within 7 days of the grant of this application.*
> 3. *That costs of this application be cost in the claim.*
> 4. *Such further and other relief as the court sees fit."*

[4] The Application is supported by three (3) affidavits swam to *by* Mr. Andrew Morales (hereinafter referred to as "Mr. Morales"). Mr. Morales is the Marketing Director or of the Applicant Company. Mr. Morales indicated that in or around 2011, the Claimant/Respondent brought the Claim against him in his personal capacity as the 1st Defendant and the Applicant as the 2nd Defendant. He retained and instructed Frankson & Richmond to defend the Claim on his behalf.

[5] Mr. Morales contended that in or around 2011, he was sent a draft defence and counterclaim by his then Attorney-at-Law which he reviewed, made changes to and returned to his Attorney for filling. The primary averment of Mr. Morales is that he was subsequently advised by his then Attorney-at-Law that the Claim against

him in his personal capacity had been struck out and the Court had instructed the Respondent that it needed to prove its Claim against the Applicant Company. He further stated that he was not told that a judgment had been granted against the Applicant Company on the issue of liability or at all and that he was never told that the draft defence and counterclaim were not filed.

[6] Mr. Morales asserted that it was in or around February 2018 when he received a letter in the post from the Respondent's Attorneys-at-Law and sought advice from his current Attorney-at-Law, that he was made aware that a judgment had been entered against the Applicant Company in default of defence and that the defence and counterclaim were never filed. The affidavit evidence outlined that the Applicant has a good defence and the draft defence is attached to the affidavit.

ISSUE

[7] The parties are ad idem that the judgment in default was regularly obtained. On this premise, the primary issue for my determination is whether the judgment should be set aside pursuant to rule 13.3 of the Civil Procedure Rules 2002, as amended (hereinafter referred to as “the CPR”).

[8] Both Counsel made written submissions in the matter and I am grateful for their industry and value in assisting the Court in coming to a resolution of this matter.

THE SUBMISSIONS OF THE APPLICANT

[9] Learned Counsel for the Applicant Mr. Paris commenced his submissions by delineating the conditions to be satisfied when deciding whether to grant the application to set aside a default judgment. The case of **Marcia Jarrett v South Regional Health Authority and others** (unreported), Supreme Court, Jamaica, Claim No. 2006HCV00816, judgment delivered on the 3rd day of November 2006 was cited by Counsel as the case that highlights these conditions.

[10] It was averted by Mr. Paris that the paramount consideration for the Court is whether the defendant, the Applicant in this regard, has a real prospect of

successfully defending the Claim and the case of **Watson v Sewell** (2013) JMCA Civ. 10 was cited to buttress this position.

[11] Mr. Paris purported that the Court should have regard to the affidavit filed in support of the application as well as the proposed defence. The Court must also have regard to the facts of the case and the points of law raised. Learned Counsel further indicated that an assessment of the proposed defence must be done to see if it provides a defence to the Claim that is arguable and is not merely fanciful and without merit.

[12] Learned Counsel in assessing the draft defence, indicated the following: -

> *"14. The draft defence raises the following defence to the claim:*
>
> ***The claim for loss of user profits***
>
> *15. The draft defence denies the claim and puts the Claimant to strict proof of any loss being claimed. This aspect of the claim raises Issues of both facts and law most suitable for a trial judge to assess.*
>
> **The claim for *a refund of the sum of USD$47,000.00***
>
> *16. The Particulars of* Claim *asserts that cheques were sent by the Defendant* to the *Claimant for this amount. The Particulars of Claim also asserts that* the *Defendant asked the Claimant not encash the cheques but* to *return them. This is denied in the Affidavit in support of this application as well as the draft defence. Additionally the Defendant has exhibited letter dated July 5, 2010 showing that the cheques were indeed sent to the Claimant's Attorney. The Defendant has not exhibited the Claimant's letter under cover of which the cheques were returned as it was sent without prejudice. The Claimant has not attached the letter to its Particulars of Claim asserting instead that it did some investigations and found irregularities with the information provided to it by* the *Defendant. A crucial issue to be determined is whether the Defendant did in* fact/ *request that the cheques not be encashed - an allegation that the Defendant has denied. The issue of whether the Claimant refused to accept payment of this sum will at minimum affect interest and cost, if any, which he can recover from the Defendant.*
>
> ***The* defence *of Set Off***
>
> *17. The Defendant asserts that it had a contract with the Claimant to supply packaging materiel to the Claimant to result in 65% savings to the Claimant in exchange for 5% of the gross daily sales of the Claimant. The Defendant performed his end of the contract by*

> *sourcing and importing bottles for the Claimant at a cost of USD$65,000,00 which the Claimant then refused to accept and also refused to make the payments to the Defendant as agreed. If successful on this claim* the *damages* to the *Defendant is* likely *to exceed any* sum to *be awarded to the* Claimant *and* the Defendant *therefore claims* the *defence of set off."*

[13] Mr. Paris asserted that on a perusal of the draft defence it cannot be said that the defence is fanciful or without merit. Learned Counsel stated that the Applicant has satisfied the requirement of having a defence with a real prospect of success.

[14] In summary, Learned Counsel outlined the following points: -

1. Judgment was entered in this Claim on the 30th day of July 2012 however the affidavit evidence revealed that the Applicant was not aware that the judgment was so entered until February 2018. The application was filed on the 20th day of March 2018. One (1) month is not regarded as an inordinate delay in filing the application to bar the Applicant from the relief sought.

2. The Court must take into account the reason for the failure to file in the first place. In the case of **Karey Hugh Powell v Philbert Mullings** [2016] JMSC Civ. 194 where the applicant stated that his attorney did not defend the claim on his behalf the court held this was not a good reason for the delay. This case can be distinguished from the case at Bar in that the Applicant held the view that the defence had been filed as he was sent draft documents to peruse, make alterations and return to his Attorney-at-Law for filing. Thereafter he was told that the Respondent was ordered to prove his Claim and assured by his Attorney-at-Law that the Respondent would not be able to do so. This is not a litigant that sat idly by without regard for his case.

3. The case of **Marcia Jarrett** v **South Regional Health Authority and others (unreported**) stipulates that the Court should have regard to the overriding objective in deciding the application. It is submitted that in order to do justice between the parties the Application should be granted. The Respondent has not yet had damages assessed and at this stage the prejudice to the Applicant will outweigh any prejudice to the Respondent (**Karey Hugh Powell v Philbert Mullings** *(supra)*). Any prejudice to the Respondent may properly be compensated by interest on the principal sum assessed as due along with an award of cost (**Leroy Johnson v Bank of Nova Scotia Jamaica** [2017] JMCA App 7).

THE SUBMISSIONS OF THE RESPONDENT

[15] Learned Counsel for the Respondent Mr. Adams submitted that based on the affidavit evidence, the Applicant has only disclosed an arguable case which is below the threshold of real prospect of success as enunciated in the case of **Russell Holdings Limited v L & W Enterprises Inc and ADS Global Limited** [2016] JMCA Civ. 39. The case of **Evans v Bartlam** [1937] AC 473 was also used to highlight the position that there must be an affidavit of merits that gives evidence to the Court that the Applicant has a prima facie defence.

[16] Mr. Adams stated that the Applicant has no real prospect of successfully defending the Claim as he was in receipt of the sum of Forty-Seven Thousand United States Dollars (US$47,000.00) to purchase equipment and packaging materials pursuant to an oral contract, emanating from the previous course of dealings of the parties. The affidavit evidence of Mr. Morales prima facie highlights that he received the said sums and failed to fulfil his part of the agreement and attempted to resolve same by a swift return of the monies. Mr. Adams further stated that the said sum has not been returned to the Respondent.

[17] It was submitted that the fault or conduct of Counsel is not a reason in and of itself a good reason for delay. The case of **Joseph Nanco v Anthony Lugg & B & J Equipment Rental Limited** [2012] JMSC Civ. 81 was cited in support of this submission. Mr. Adams asserted that there is no good reason for the failure to file the defence because absolutely no evidence is before this Honourable Court of the steps taken to ascertain the status of the Applicant's maker after the untimely passing of his previous Attorney-at-Law. The absence of a good reason should have the effect of militating against the setting aside of the Default Judgment.

[18] Learned Counsel averred that the issue of promptitude is of considerable significance and carries the weight which must be examined by the Court. The case of **Joseph Nanco v Anthony Lugg & B & J Equipment Rental Limited** *(supra)* was again used to buttress this position. Mr. Adams submitted that the

Applicant did not act with alacrity to apply to set aside the Default judgment after one (1) month of the said judgment coming to its attention. Learned Counsel further stated that the delay is inordinate especially when viewed against the background that these set of facts were not new to the Applicant. He purported that the significance of this limb as explained in **Joseph Nanco v Anthony Lugg & B & J Equipment Rental Limited** *(supra)* can shut out a litigant even if found to have a real prospect of successfully defending the Claim.

[19] In relation to the issue of prejudice, Learned Counsel submitted that the Respondent has been put out of pocket for over a decade due to the conduct of the Applicant. In particular, the scales of justice weigh in favour of the Respondent due to the commercial losses as a result of the failure to expand, which have been occasioned from the equipment and packaging materials not being delivered. Learned Counsel concluded his submissions by stating that Costs should be awarded to the Respondent to be taxed if not agreed within Twenty-Eight (28) days of the Order due to the fact that this matter has been filed since 2011 and it was the failure of the Applicant to file the defence which has resulted in this Application.

LAW AND ANALYSIS

[20] It is wonted in our Courts and the practice of Civil Procedure that when considering an application to set aside a regularly obtained default judgment, rule 13. 3 is the criterion. It is also established that the primary test for consideration is whether the applicant *has* a real prospect of successfully defending the *claim. In the landmark* case of **Swain** v **Hillman** [2001J *1 All ER 91* Lord *Woolf stated: -*

> *"The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or,… they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."*

[21] Also, in the case of **International Finance Corporation v Utexara** (2001) CLC 1361 Moore-Bick, J stated that: -

> *"A person who holds a regular Judgment, even a Default Judgment, has something of value and in order to avoid injustice he should not be deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice to set the Judgment aside…* the expression "realistic/prospect of success" in this context means a case which carries a degree of conviction."

[22] The case of **Russell Holdings Limited v *L & W* Enterprises Inc and ADS Global Limited** *(supra) provides guidance on* how the Court should go about evaluating *whether the* test has been satisfied. The Honourable Miss Justice Edwards (AG) (as she then was) in delivering the judgment *of the* Court *stated at* paragraphs *82* and 83: -

> *"For there to be a real prospect of success the defence must be more than merely arguable and the court, in exercising its discretion, must look at the claim and any draft defence filed. Whilst the court should not and must not embark on a mini trial, some evaluation of the material placed before it for consideration should be conducted. The application must therefore be accompanied by evidence on affidavit and a draft of the proposed defence.*
>
> *A defendant who has a real prospect of successfully defending the claim may still be shut out of litigation if the factors in rule 13.3(2)(a) and (b) are considered against his favour and if the likely prejudice to the respondent is so great that, in keeping with the overriding objective, the court forms the view that its discretion should not be exercised in the applicant's favour. If a judge in hearing an application to set aside a default judgment regularly obtained considers that the defence is without merit and has no real prospect of success, then that's the end of the matter. If it is considered that there is a good defence on the merits with a real prospect of success, the judge should then consider the other factors such as any explanation for not filing an acknowledgement of service or defence as the case may be, the time it took the defendant to apply to set the judgment aside, any explanation for that delay, any possible prejudice to the claimant and the overriding objective."*

[23] With this guidance in mind I now examine the affidavit evidence filed in support of the Application to determine whether the proposed defence is sufficient to satisfy the test.

Whether the draft defense has a real prospect of success?

[24] The affidavit evidence sought to explain the reason for the Applicant Company's default and stated that there was a good defence, a draft copy of which was attached to the affidavit.

[25] After examining the proposed draft defence, counterclaim and affidavit evidence as put forward and juxtaposing them with the pleadings, it is my view that the Applicant failed to put its case in a thorough manner before the Court and has failed to meet the requirements of Part 10 of the CPR. The draft defence not only was replete with bare denials, but it failed to give compelling reasons for resisting the claim. In my judgment, an analysis of the nature of both the defence and counterclaim admitted the central averments of the Respondent's cause of action in that there was an oral contract for the Applicant to purchase packaging material and equipment on behalf of the Respondent and that it received the sum of Forty-Seven Thousand United States Dollars (US$47,000.00) under the contract.

[26] The draft defence provided no further facts answering the Respondent's cause of action and produced no material, documentary or otherwise to undermine the allegations of the Respondent that it failed to fulfil its part of the contract. In my view, it would have been prudent to provide some invoice or bill of lading to support its essential contention that the equipment was acquired as per the oral contract between the parties. This contention ought to have been clearly and unequivocally set out in the draft defence and counterclaim. In relation to its defence of set off, the Applicant has also failed to show that those sums are in fact due to it from the Respondent company thereby extirpating the defence.

[27] I am guided by the dicta issued by the Honourable Mr. Justice A Rattray at paragraph 25 in the case of **Medine Forrest v Kevin Anthony Walker and Jhanelle Sabrina Pitt** [2019] JMSC Civ. 25-

> *"Rule 10.5 of the CPR indicates that bare denials do not constitute a good Defence. That particular Rule places an obligation on a Defendant to state*

> *all the facts on which he relies to dispute the claim, and in the circumstances a simple denial is not sufficient..."*

[28] In adopting the guidance of Craig Osbourn, at page 364 of **Civil Litigation, Legal Practice Course Guides 2005-2006**, the Applicant must file evidence to persuade the Court that there are serious issues which provide a real prospect of it successfully defending the claim. In my judgment, the defendant failed to do so and there are no reasonable grounds that exist to impel my belief that a fuller investigation into the facts is required. On this ground alone, it being *the* paramount consideration of the Court, the application must fail.

[29] Having found that the Applicant has no real prospect of successfully defending the claim, it is unnecessary to consider the questions of whether there was reasonable promptitude in bringing the application and whether there was a reasonable explanation for the failure to file the *Defence* (see McDonald J at paragraph 28 of **Kimaley Prince v Gibson Trading & Automotive Limited (GTA)** |2016J JMSC Civ 147.) However, for the sake of completeness I will consider these factors in concision.

Whether the Applicant has given a good reason for failing to file the defence?

[30] In essence, the Applicant has proffered that the failure to file the defence is a fault to be attributed to its then Attorney-at-Law who did not file the defence as it instructed. Mr. Morales also indicated that the Attorney-at-Law made certain assurances regarding the alleged outcome of the case. It is customary for the Courts in our jurisprudence to assist litigants where it is clear that their attorneys have caused them to be disenchanted. Phillips, JA at paragraph 30 of the case of **Merlene Murray – Brown v Dunstan Harper & Winsome Harper et al** [2010] JMCA App 1 stated: -

> *"The fact is that there are many cases in which the litigants are left exposed and their rights infringed due to attorneys errors made inadvertently, which the court must review.* ***In the interests of justice, and based on the overriding objective, the peculiar facts of a particular case, and depending on the question of possible prejudice or not as the case may be to any party, the court must step in to protect the litigant when***

> ***those whom he has paid to do so have failed him, although it was not intended." [my emphasis]***

[31] The Court in that case decided that inadvertence on the part of an Attorney-at-Law may be considered a good explanation for failing to file a defence within the stipulated time. However, the instant case can be distinguished and I find that the Applicant's intent to defend in the case at Bar was not demonstrated. The Applicant indicated that it gave instructions for the filing of a counterclaim whereby it asserted that it is entitled to damages from the Respondent for breach of contract. It does not cogently follow that it would have just rest assured with the explanation that the Respondent's case against it was essentially dismissed without taking any active steps to ascertain what was the outcome of its counterclaim. There is also no explanation provided as to why the Applicant would not have pursued its counterclaim and resultantly abandon it. Perhaps then it would have been brought to light that the documents were not filed. In my judgment, the failure to file a defence cannot appropriately be attributed to the Attorney-at-Law.

[32] I also adopt the statement made by the Honourable Ms. Justice Nicole Simmons (as she then was) in the case of **Corey Jackson v Annmarie Phillips and Priscilla Fisher** [2017] JMSC Civ 30. At paragraph 35 Simmons J said:

> *"It is clear from the authorities that the general rule is that, the actions or transgressions of counsel will be attributable to his client. In most instances, the client will be the one who pays the price."*

[33] I find that the Applicant was not diligent in pursuing its defence and the Court is of the view that no good reason has been proffered for the failure to file a defence in the circumstances. Even if I am incorrect on my finding as to the Applicant's likelihood of success, I am of the view that the application would fail based on this ground.

Whether the application to set aside was made as soon as was reasonably practicable after finding out that judgment had been entered

[34] I find the view expressed by the Honourable Mrs. Justice McDonald- Bishop, JA in **Flexnon Limited v Constantine Michell et al** [2015J JMCA App 55 instructive. At paragraph 32 McDonald-Bishop JA in delivering the oral judgment of the court stated: -

> *"In our jurisdiction, where there is an embedded and crippling culture of delay, significant weight must be accorded to the issue of delay, whenever it arises as a material consideration on any application. The application to set aside a regularly obtained default judgment is one such type of application where the consideration of delay should figure prominently. "*

[35] Brooks JA in the case of **H.B. Ramsay and Associates Ltd and Others v Jamaica Redevelopment Foundation Inc and Another** [2013] JMCA Civ 1 stated that: -

> *"…the word "promptly", does have some measure of flexibility in its application. Whether something has been promptly done or not, depends on the circumstances of the case "*

[36] In all the circumstances, I cannot say the delay of one month from the date on which the default judgment came to the attention of the Applicant to when the application to set aside was filed is inordinate or substantial. I will however reiterate that the predominant consideration for the Court is whether there is a real prospect of the Applicant successfully defending the Claim.

Prejudice and the overriding objective

[37] McDonald-Bishop J (Ag.) (as she then was) in the case of M**arcia Jarrett v South East Regional Health Authority et al** (unreported) Supreme Court, Jamaica, Claim No. 2006 HCV 00816, judgement delivered on the 3rd day of November 2006 directed that the overriding objective and the issue of prejudice must also be considered on applications to set aside default judgment.

[38] Prejudice has to be weighed against the likelihood of success of the defence. I find that the Respondent did all that was required of it to secure the default judgment and to set aside it aside would cause colossal prejudice to it. I am fortified in this view in the light of my findings that the Applicant has no real prospect of successfully defending the claim. The dicta of Moore-Bick J **International Finance Corporation v Utexafrica SPRL** *(supra)* as stated at paragraph 21 of this judgment is instructive.

[39] I also adopt the words of McDonald-Bishop J (as she then was) at paragraph 92 of the case of **Joseph Nanco v Anthony Lugg and B & J Equipment Rental Limited** *(supra)* where she stated: -

> *"The claimant has something of value in his hand and he ought not to be deprived of it without good and compelling reasons shown. While it is appreciated that the court must not be quick to deprive a litigant of his day in court on a point of technicality and without an assessment of the merits of the case, it is also the duty of the court to ensure that time limits are obeyed and that there are no flagrant disregard for the rules of procedure.* ***The rules must be interpreted and applied in order to give effect to the overriding objective which involves ensuring, as far as practicable, that cases are dealt with expeditiously and fairly. To set aside this default judgment, given all the attendant circumstances of the case, would not be in keeping with the overriding objective of the CPR or in keeping with fairness, broadly speaking." [my emphasis]***

[40] In all the circumstances and for the reasons stated above, the administration of justice requires that the application be refused.

ORDERS & DISPOSITION

1. Application to set aside judgment in default of defence dated March 21, 2018 and filed March 22, 2018 is refused.

2. Date for assessment of damages is set for October 21, 2020 at 10:00am.

3. Costs to the Respondent to be taxed if not agreed.