**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Common Law and Equity Division**

**2018/CLE/gen/00658**

**BETWEEN**

**THOMAS S. MCGOWAN**

**Plaintiff**

**AND**

**THE CSB MANAGEMENT COMPANY LTD.**

**Defendant**

**Before Hon. Mr. Justice Ian Winder**

**Appearances:** Randol Dorsett for the Plaintiff

Obie Ferguson Jr. for the Defendant

7 February 2019

**RULING**

**WINDER, J**

1. This is defendant's application by Summons for the setting aside of a default judgment entered on 12 July 2018. The draft Defence and Counterclaim was attached to the Summons.

2. The application was supported by the affidavit of Alva Coakley on behalf of the plaintiff. The affidavit seeks to explain the delay in filing the Defence, namely the illness of Mr. Ferguson, counsel for the defendant. The Affidavit also exhibited a letter of 7 June 2018 written by Mr. Ferguson seeking to answer an allegation of wrongful repudiation of the plaintiff's contract of employment.

3. The underlying facts of the case was that the plaintiff had been in the employment of the defendant and during April (26th) and May (13th) 2018 the defendant advised the plaintiff that it was unable to pay his salary due to *"financial constraints"*.

4. On 23 May 2018 the plaintiff wrote to the defendant indicating that he had accepted the repudiation of the employment contract by the defendant and demanding damages. The plaintiff says that following his acceptance of the breach, the defendant paid to the plaintiff the sum of $13,193.75 on 30 May 3018 leaving a balance of $11,736.47 due and owing in respect of back pay.

5. The action was commenced by the plaintiff claiming the sum of $11,736.47 in outstanding pay and damages by breach of contract. On the failure to defend the action the plaintiff entered judgment in default precipitating the present summons to set aside.

6. On 7 February 2018 at the initial hearing of the application the defendant represented that it has paid the plaintiff his outstanding salary and that it had a meritorious defence.

7. In the face of Mr. Ferguson's representations, the defendant was given the opportunity to produce the evidence to substantiate its claims by 22 February 2019. The Court gave the Plaintiff up to 1 March 2019 to file affidavit evidence in reply, if needed. It was agreed that the Court would then consider the matter on the papers, and render a ruling.

8. Instead, the defendant filed a defence which was materially different from the draft attached to the Summons. Firstly the new filing withdrew the counterclaim and sought to defend the claim on the basis that it was in fact the plaintiff who repudiated the contract of employment by failing to provide a sick slip for a period in May 2018 when he was on sick leave.

9. The defendant admits that it did not pay the plaintiff for the month of April and May 2018 when these payments fell due. The defendant has not substantiated any of the averments in the defence, notwithstanding it had been filed improperly.

10. Order 19 rule 9 of the Rules of the Supreme Court provides:

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

11. The requirement to show a meritorious defence with a real prospect of success was recently examined and accepted by the Court of Appeal in The Bahamas in **Hanna and another v Lausten** [2018] 1 BHS J. No. 172 where it was observed as follows:

> 82. As we see it, the starting point for any discussion on the law and practice relating to the discretionary power of a judge to set aside a default judgment whether entered under O. 13 or O. 19 usually begins with the oft-cited 1937 decision of the House of Lords in **Evans v. Bartlam** (*above*). Although the judgment in **Evans v. Bartlam** was one which was regularly entered in default of appearance, the authority applies with equal force to the exercise of the judicial discretion to set aside a regular judgment entered in default of defence conferred under O. 19.

83. In their individual speeches, their Lordships explained that the discretionary power conferred under the rules to set aside a default judgment is unconditional, but that the courts have, however, laid down for themselves rules to guide them in the normal exercise of their discretion.

84. Lord Atkin acknowledged the existence of one rule (referred to in some of the older authorities as an (almost) inflexible rule) which requires an applicant to produce an affidavit of merits, meaning that evidence must be produced to satisfy the court that the applicant has a *prima facie* defence. [See also **Farden v. Richter** (1889) 23 Q.B.D. 124; **Hopton v. Robertson** [1884] 23 Q.B.D. 126 **Richardson v. Howell** (1883) 8 T.L.R. 445; and **Watt v. Barnett** (1878) 3 Q.B.D. 183 (mentioned at Practice Note 13/9/7 of Volume 1 of the 1999 Annual Practice) in which the necessity for the application to be supported by an affidavit showing a defence on the merits is discussed.]

...

86. Lord Atkin even went as far as to suggest that even the rule requiring an Affidavit of merits could in rare and appropriate cases be departed from. At page 480 he expressed the following view, with which Lord Thankerton concurred:

> "But in any case in my opinion the Court does not, and I doubt whether it can, lay down rigid rules which deprive it of jurisdiction. Even the first rule as to affidavit of merits could, in no doubt rare but appropriate cases, be departed from. The supposed second rule does not in my opinion exist."

...

90. At page 223 the Court of Appeal interpreted all of the judgments of the House of Lords in **Evan v. Bartlam** as clearly contemplating that a defendant who is asking the court to exercise its discretion to set aside a default judgment in his favour "*should show that he has a defence which has a real prospect of success*". Their Lordships outlined the nature of the task which is to be undertaken by the court which is exercising the discretion in the following terms:

> "In our opinion, therefore, to arrive at a reasoned assessment of the justice of the case the Court must form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed. The "arguable" defence must carry some degree of conviction."

12. The plaintiff says at paragraphs 9 and 10 of its supplemental submissions that:

9. The Defendant does not have a meritorious defence and there is nothing in the papers which it has produced which shows that it has a real prospect of success, should the default judgment be set aside.

10. The Defendant does not argue that payments under the subject contract were not due. Even in its irregularly filed defence of 18th February 2019 at paragraphs 5 and 6 thereof it admits that it failed to pay the Plaintiff his salary when due on at least two consecutive occasions! The Defendant does not even deny in its irregularly filed defence, that such a failure was a breach of contract! The supposed Defence of the Defendant which is revealed in paragraph 7 of its irregularly filed Defence is that the Plaintiff:

    (a) after not being paid in April 2018 and May 2018 against his will and consent;
    (b) after arrogantly being told that his consent was "not requested"; and
    (c) after arrogantly being told that there was no indication of when the salaries past due would be paid;

    took sick leave on 11th May 2018 and failed to bring in a sick slip!

13. The plaintiff says, and I accept, that the alleged infraction took place after the defendant failed to pay the plaintiff as required under the contract of employment. It is difficult to impress upon the plaintiff, as the defendant seeks to do, an obligation to return to work and provide a sick slip having elected to accept the breach and repudiation of the contract of employment. In the circumstances I strike out the defendant's judgment as irregularly entered and refuse the application to set aside the default judgment. I am not satisfied that the defendant has shown a meritorious defence with good prospects of success.

14. The plaintiff shall have his costs of the application to be taxed if not agreed.

Dated the 17th day of July AD 2019

Ian Winder

Justice