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1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 550/2006

19/7/07

6 BETWEEN: **TYPHOON SEAS INC.** Plaintiff

8 AND: JANICE ASHBY 1st Defendant

10 AND: ADENY BORDEN 2nd Defendant

13 BOTH EXECUTRICES OF THE ESTATE OF MANDELL BORDEN

16 Appearances: Mr. George Giglioli of Giglioli & Company for the Plaintiff
17 Mr. Norman Hill Q.C. instructed by Creary & Associates for
18 the Defendants

20 Before: Hon. Justice Levers

23 Heard: April 10, 2007



25 JUDGMENT

27 This is an application by way of a summons to set aside a Default Judgment obtained by

28 the Plaintiff Typhoon Seas Inc. The following relief is asked for in this summons:

- 29 1. THAT the Plaintiff and each of them whether by their servants, agents or
- 30 howsoever otherwise be restrained from proceeding with the Order for
- 31 payment out of the monies paid into Court by Order of this Honourable Court
- 32 on the 25th day of January 2007 and that the said money remain in Court until
- 33 the application to Set Aside the Default Judgment is heard and action is
- 34 determined.
- 35
- 36 2. THAT the Defendants be granted an Extension of Time to file their Defence.
- 37
- 38 3. THAT the Default Judgment made on 14th day of February 2007 be Set Aside
- 39 on the grounds that the Defendants have a good defence to this action and that
- 40 the Defendants are at liberty to defend the action by filing an
- 41 Acknowledgement of Service and then the Defence.
- 42
- 43 4. THAT the time for service of this summons be abridged.
- 44

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1 5. Any other relief as this Honourable Court deems fit.

2
3 At the hearing this morning Mr. Hill Q.C. who appears on behalf of the Applicants
4 (Defendants) requested leave to amend the summons by adding an “s” to the word ground
5 in paragraph three and by requesting an amendment after the word ground namely to add
6 the words “and that the writ of summons was not served on the Defendant and there was
7 no proper affidavit of service.” The amendment was allowed.

8
9 This was the first time that this ground was advanced to the court. A writ of summons
10 was filed on 20th December 2006 claiming *inter alia* U.S. \$589,524.48 on account of the
11 outstanding and unpaid sum due under the promissory note and interest thereon pursuant
12 to the terms of the promissory note at the rate of 9% per annum to the date of payment
13 and the daily rate being U.S. \$132.28. An *ex parte* summons was also filed on the 20th
14 December 2006 seeking an injunction and leave to serve the writ out of the jurisdiction
15 by way of substituted service.

16
17 An injunction was granted on the 20th of December 2006 to the Plaintiff ordering the
18 Defendants not to dispose of their assets and making various other orders. The purpose
19 of this application are presently of no moment. The matter proceeded and the attorneys
20 were in communication with each other, finally agreeing to a consent order filed on
21 January 17th 2007 discharging the injunction and making payment into court pending the
22 determination of this matter. Surprisingly, no mention was made of a writ of summons
23 not having been received. Notice of payment into court was filed on the 25th of January
24 2007.

1

2 A Default Judgment was filed on 13th February 2007 and on the 27th of February 2007 the
3 summons was filed seeking to set aside the Default Judgment. On the 6th March 2007,
4 the matter came before the court with the Defendants asking to restrain the Plaintiff from
5 removing the monies from the court allegedly based on an order made on the 17th January
6 2007. Unfortunately the order did not exist and the court dismissed the summons with
7 costs to be paid to the Plaintiff by Creary & Associates.

8

9 Those are the facts against which this application is to be heard. There are two grounds.
10 One, the writ of summons was not served on the Defendant and there was no proper
11 affidavit of service and two that there is a defence which has some prospect of success
12 and has merit and therefore the Default Judgment should be set aside.

13

14 THAT THE WRIT OF SUMMONS WAS NOT SERVED ON THE DEFENDANT AND
15 THERE IS NO PROPER AFFIDAVIT OF SERVICE

16

17 Norman Hill Q.C. on behalf of the Applicant/Defendants relies on Order 13 Rule 7 of the
18 *Supreme Court Practice* and in particular Rule 7 (1) b “the rule states that service may be
19 proved by the Defendants filing an affidavit proving due service of the writ on the
20 Defendant. The affidavit of service must be a proper affidavit proving due service of the
21 writ on the Defendant. The affidavit of service must state by whom the writ was served,
22 the day of the week and the date on which it was served and where and how it was
23 served. Where such an affidavit did not state where the writ was served it was held

1 insufficient that as it might have been served out of the jurisdiction.” Rule 7 (1) c reads
2 “the rule also provides that where the Plaintiff produces the writ endorsed by the
3 Defendant’s solicitors with a statement that he accepts service of the writ on the
4 Defendant’s behalf, the Plaintiff is not required to prove due service of the writ on the
5 Defendant by affidavit.” These rules of course apply where there is no acknowledgement
6 of service.

7

8 The facts in this case are that the attorneys for the Plaintiff and the Defendants were in
9 communication with each other prior to the commencement of proceedings. The
10 e-mails are most illustrative bearing in mind that this is a ground on which the attorneys
11 for the Defendants allege that they did not get the writ of summons. On the 12th of
12 January 2007 the Plaintiff’s attorney Mr. Giglioli wrote to the Defendants’ attorney
13 Ms. Creary as follows: “to this end I shall be grateful if you would confirm that you have
14 instructions to accept service on behalf of Mrs. Ashby and Mrs. Borden of the writ and
15 other documents filed to date. It will also be necessary for your client to enter an
16 appearance before we are able to take any further steps in this matter. To this end I
17 should be grateful if you would obtain your client’s instructions. If you have instructions
18 to accept service on their behalf then I shall be grateful if you proceed to enter an
19 appearance.

20

21 Once your client’s appearances have been regularized then we can deal with amending
22 the terms of the injunctions by consent to allow the property to be sold and the monies
23 paid into court depending on the outcome of this litigation.

1

2 You will appreciate that until you file an application on behalf of Mrs. Bodden and
3 Mr. Ashby you have no standing in this matter on their behalf.” Ms. Creary’s response
4 by email to Mr. Giglioli on the 12th January 2007: “Dear Mr. Giglioli we had always
5 had authorization from our client to accept service on their behalf. At this point this we
6 still do. We would therefore appreciate copies of the affidavit supporting your prior court
7 application as soon as possible. If electronic copies are available we would also
8 appreciate receiving them electronically or by facsimile (345) 943-6292. In any event we
9 will be filing a notice of appearance on Monday morning and will serve you
10 accordingly.”

11

12 Every law student is informed that you cannot get an injunction in a vacuum. A writ of
13 summons must be the first step towards granting an injunction or an undertaking to file
14 the same. In the circumstances when a notice of intention to act dated the 15th January
15 2007 was filed by Creary & Associates, it would not be overly demanding to assume that
16 either the writ of summons was already in the possession of the attorney or if she did not
17 get it at any point an enquiry should have been made before she submitted to the
18 jurisdiction of the court. Indeed Mr. Giglioli on the 12th of January 2007 states “of
19 course your clients are on notice of the proceedings and the terms of the various
20 pleadings and evidence filed and have personally served these documents on your office
21 shortly after the injunction was obtained.” Mr. Giglioli’s case is that he personally served
22 the documents on Ms. Creary and did not hear from Ms. Creary complaining there was
23 no writ of summons served. One would have thought that at the appearance before the

1 Chief Justice when a consent order was made discharging the injunction some complaint
2 or affidavit would have been filed saying that the writ of summons was never served on
3 the Defendants or on the attorney.

4
5 The purpose of the requirement for the proof of service is not so that the court can be
6 introduced to the man who served the documents but to ensure that there is adequate
7 proof that the writ was served. Even if a writ is returned by the post undelivered, if the
8 Plaintiff can show to the court that the writ will have come to the knowledge of the
9 Defendant within the time and also that the copy had not been returned to him through
10 the post before the judgment in default was entered or the document undelivered to the
11 addresses, then the court has a discretion not to set aside Default Judgment as of right.

12 Mr. Hill's submission is that when the Default Judgment was entered, the affidavit of
13 service was insufficient and therefore this matter should be set aside as of right. One of
14 the reasons is simply that it does not mention the bailiff's name. Mr. Hill however
15 overlooks the situation in this particular case. His own clients have filed an affidavit
16 stating "in fact the documents were left by the front door of my home under
17 circumstances where at approximately 10:00 p.m. I heard a terrible pounding at my front
18 door with an unknown male person shouting and cursing at me. Without the benefit of an
19 introduction or identification from the person as a process server and due to his unsettling
20 behaviour I was hesitant to opening my front door. At this point the unknown person
21 threw a red folder at the front door and screamed 'consider yourself served.' After
22 waiting some time to ensure that this person had left the immediate vicinity of my home I
23 retrieved the red folder on the ground containing a writ of summons, affidavit of William

1 Jackson and affidavit of Russell Steiner.” “We deny paragraph 7 of the affidavit as we’re
2 advised by our attorney-at-law mentioned above and we readily believe that the
3 documents served on the offices of Creary & Associates with cover letter date 17th
4 January 2007 did not include the writ of summons but only the affidavit. Further the
5 package with the writ and affidavits was left at the front door to our home on or about the
6 24th of January 2007 and up to that time Mrs. Creary advised that she still had not
7 received a copy of the writ of summons. We then sent the entire package that had been
8 left by our front door to Mrs. Creary.”

9

10 It is convenient at this stage to refer to the affidavit of Ms. Creary. She states “that such
11 package of documents did not contain a copy of the writ of summons with the
12 acknowledgement of service and this package exhibited and marked as SJC 2. That it is
13 not appreciated that the documents, writ and acknowledgement of service were not
14 served on my office as stated in the Plaintiff’s attorney’s second affidavit but rather were
15 received by the Defendant out of the jurisdiction which was later forwarded to my office
16 here in my absence from the island.”

17

18 Clearly Ms. Creary the Defendants’ own attorney is admitting that the Defendants
19 received the writ of summons. She says “that the documentation was not personally
20 served on the Defendants but left at their place of residence and my office was not
21 advised on what documentation was received. The Defendants forwarded the documents
22 to my office at a later date.”

23

1 “But prior to the Default Judgment being entered I was off the island on an emergency
2 for two weeks. Due to my illness and upon my return to the office I discovered the writ
3 of summons was among the documentation delivered to my office by the Defendants.”
4 “That the effect of the Default Judgment and order to pay the money out of court will
5 adversely affect the Defendants who have a good and arguable case.” “It should also be
6 noted that the Plaintiff’s attorneys have not filed or established that affidavit of service of
7 the writ of summons has been served on the Defendants or on Creary & Associates.”

8
9 It is somewhat surprising to find an attorney-at-law in practice in this jurisdiction coming
10 before the court and arguing that the conduct of this matter was undertaken by her to the
11 extent that a consent order was made to vary an injunction without having sight of a writ
12 of summons and that the payment was made into court on a matter without having a writ
13 of summons. However, in order to set aside a Default Judgment it must be shown to the
14 court that the Defendants did not know that a writ of summons had been issued against
15 them and the contents thereof or that they did not receive the writ of summons. If it
16 transpires during the application the Defendants did in fact receive the writ of summons,
17 then it is my view that the time spent on the submissions was an utter waste of this
18 court’s time. The whole purpose of rules and regulations is as I have said previously to
19 ensure that justice is done to all and if it transpires that the Defendants did in fact receive
20 the writ of summons and that in order to ensure that the Plaintiff could not have his
21 judgment, did nothing or said nothing, to prevent the Default Judgment being entered it
22 would be considered an act designed to ensure that justice was not done.

23

1 I now turn to the ground of setting aside on the merits that have been advanced by
2 Mr. Norman Hill. In *Thorn PLC v. McDonald* [1999] CPLR 660 the Court of Appeal
3 approved the following principles:

4 (a) While the length of any delay by the defendant must be taken into account
5 any pre-action delay is irrelevant.
6

7 (b) Any failure by the defendant to provide a good explanation for the delay
8 is a factor to be taken into account, but is not always a reason to refuse to
9 set aside.
10

11 (c) The primary considerations is whether there is a defence with a real prospect
12 of success, and that justice should be done. The question whether there is a
13 defence with a real prospect of success is the same as on applications for
14 summary judgment (*ED & F Man Liquid Products Ltd v. Patel* [2003] CPLR
15 384), and is discussed in detail at 20.5.2 to 20.5.15.
16

17 (d) Prejudice (or the absence of it) to the claimant also has to be taken into
18 account.
19

20 The written evidence in support of the application, that is the affidavit in support to set
21 aside will have to address these factors above and in particular the alleged defence on the
22 merits, the reason for not responding to the claim in time and the explanation for any
23 delay in making the application to set aside.
24

25 Mr. Giglioli makes the point that I must review this ground against the background that
26 the fact that the debt was owing has always been accepted and that there are affidavits by
27 Mr. Steiner and Mr. Keller that Captain Borden, the Defendant deceased, was loaned
28 substantial money by Mr. Steiner the Plaintiff's representative. The defence is as
29 outlined in the Defendants' unsworn affidavit which it is hoped to have been now sworn
30 and filed in accordance with the undertaken given by Queens Counsel. Paragraphs seven
31 and eight as outlined by the Defendants, are facts which have been told to them by

1 various persons who were involved in the transaction. In essence the Defendants
2 confirmed the defence and say that the mortgage consolidated all the fund remaining
3 including the one that is the subject matter of these proceedings. However, the
4 identification of the promissory note is not the best that one can hope for and the other
5 persons, the attorneys etc., who have the filed affidavits do not identify this particular
6 note by date, save and accept that the quantum is the same. The question for this court is
7 in the absence of the parties in person to confirm their intentions can it be said that a
8 mortgage that does not specify a particular promissory note invalidate the promissory
9 note in question? The court has to be satisfied in setting aside a defence that there is a
10 meritorious defence. In *Thorn PLC v. McDonald* 1999 CPRL 660 the Court of Appeal
11 approves the principle, set out above. Even before looking at the affidavit of the
12 Defendants as to the content therein, I wish to state the delay and the conduct of the
13 matter by the attorney Ms. Creary leaves a lot to be desired. The delay is clearly hers.
14 The conduct I speak of is having knowledge of the proceedings to be started, Mr. Giglioli
15 corresponding with her, delivering a package of papers and subjecting herself to the
16 jurisdiction of the court on behalf of the Defendants by paying money into court and not
17 once mentioning that the writ of summons is missing.

18
19
20 I have to say that I am not convinced beyond reasonable doubt that there was no
21 summons in the package. Hopefully, it may have been overlooked by somebody in either
22 office but I am not convinced sufficiently to say that there was no service. What is
23 clearer is that Ms. Creary was off the island for the time and the matter simply did not
24 receive her attention. She made an application to this court even before an order was

1 made asking for a stay not to take the monies out of court. This matter and the
2 conduct of it leaves a great deal to be desired.

3

4 I now turn to the affidavit of the Defendants. The Defendants speak in paragraphs seven
5 and eight as if it was they who had negotiated and it was they who had borrowed the
6 money. They do not say they were informed nor do they say they were present at the
7 time of the execution of the papers or the agreement negotiated. I am not aware how they
8 have received this knowledge. Nowhere do I see an explanation for the delay and
9 nowhere do I see that in their view, or in their opinion, they have a defence on the merits.
10 It is in my view such trite law that an attorney cannot, and should not file an affidavit, in
11 matters such as this. One needs look no further than *Ramkissoon v. Olde's Discount*
12 *Company PCC Limited* 4 WIR Page 1973 . Where it was held the solicitor's affidavit did
13 not amount to an affidavit stating facts showing a substantial ground of defence and as
14 the facts related in the statement of defence were not sworn to by anyone there was no
15 affidavit of merits before the judge.

16

17 In this case there is no defence before the court. One would have thought in order to
18 ensure that the court is satisfied that there is in fact a defence, there would be a draft one
19 and secondly the affidavit of the Defendants really takes the matter no further as I have
20 already ruled that the ground as to service has no merit. I rely on the words of Cockburn
21 C.J. in *Watt v. Barnett* 3 QB D at page 185 when he said "before letting the Defendant
22 into defend we must consider whether he gives us any grounds for thinking that he has a
23 substantial case which he desires to try. If he does not, we are not bound to set aside the

1 judgment which we may think ought in the interest of justice to stand.” The court must
2 first decide in the present case whether it is satisfied that there is a good defence on the
3 merits and if there is not leave to defend, ought to be refused.

4

5 In this case I believe there are serious issues to be tried. It is not a question of whether
6 the mortgage invalidates the promissory note necessarily but whether the parties formed
7 an agreement which was implemented by the attorneys after the promissory note was
8 drafted. If in fact there is an agreement which resulted in this mortgage can the Plaintiff
9 rely on the promissory note. There are facts in dispute which ought to be tried and I do
10 not wish to punish the Defendants for the manner in which this matter has been handled.

11 I give leave to file a defence within fourteen days from the date of this order; set aside the
12 Default Judgment and order the costs of the Plaintiff up to date to be paid on an
13 indemnity basis.

14

15 Dated this 19th day of April, 2007

16

17

18 Levers. J.
19 Acting Chief Justice

