

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 68 of 2013

BETWEEN : **ST. AUBYN LIMITED** a limited liability company duly incorporated in Fiji and having its registered office situated at BDO Zarin Ali, Level 8, Dominion House, Thompson Street, Suva.

PLAINTIFF

AND : **YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF FIJI (INCORPORATED)**, a charitable trust duly registered pursuant to the Charitable Trust Ordinance and having its registered office at 3 Des Vouex Road, Suva.

DEFENDANT

Appearances : Siwatibau and Sloan for the Plaintiff
Neel Shivam Lawyers for the Defendant

Coram : Acting Master S.F. Bull

Hearing : 18 May 2016

Ruling : 26 September 2016

RULING

1. This is the Defendant's application to set aside the interlocutory judgment entered against it by the Plaintiff on 7 July 2015, on account of the Defendant's default in filing a defence.

Default judgment

2. The writ of summons with indorsement of claim was issued on 15 March 2013 and served on the Defendant on 19 March 2013. The Defendant acknowledged service on 22 March 2013, giving notice of an intention to defend.
3. No statement of claim was filed by the Plaintiff as required under Order 18 rule 1, and on 2 July 2013, the Defendant applied to strike out the writ of summons.
4. On 19 August 2013, the Plaintiff filed an application seeking extension of time to file its statement of claim.
5. Both the striking out and leave applications were heard together on 1 November 2013 and in a judgment dated 19 September 2014, the Court refused the striking out application and extended time for the Plaintiff to file a statement of claim. The claim was filed on 17 October 2014 and served on 20 October 2014.
6. A second striking out application by the Defendant filed on 11 November 2014 was struck out on 2 June 2015 for non appearance, with the Court directing for the matter to take its normal course thereafter.
7. On 17 June 2015, the Plaintiff filed interlocutory judgment which is the subject of this application. Interlocutory judgment was issued on 7 July 2015. Thereafter, the Plaintiff filed a notice for assessment of damages.
8. The Defendant's application to set aside the interlocutory judgment was filed on 17 July 2015.

9. The Plaintiff makes a preliminary objection to the affidavit in support of the application, on account of the absence of an indorsement note as required under Order 41 rule 9 of the High Court Rules. The Defendant in reply seeks leave to use and rely on the said affidavit notwithstanding the absence of an indorsement note.
10. Order 41 rule 9 is a mandatory rule and must be complied with. (*Chandrika Prasad v Republic of Fiji & Attorney-General* (2001) 2 FLR 39 HBC 217/00L 17 January 2001) Omission of the indorsement note is an irregularity and leave of the Court is required for it to be filed or used. (*Kim Industries Ltd, In Re* (No 1) [2000] FJHC 267; [2000] 1 FLR 141 (7 July 2000))
11. Having considered the submissions, I grant leave for the Defendant to use its affidavit in support in these proceedings notwithstanding the non-compliance with Order 41 rule 9.

The law

12. The law on setting aside in this jurisdiction is settled. Where a default judgment has been entered regularly, or in compliance with the Rules, the defendant is required to show an affidavit of merits in order to succeed in setting aside the default judgment. (*Fiji Sugar Corporation Ltd. v Ismail* [1988] FJCA 1; [1988] 34 FLR 75 (8 July 1988)).
13. Where the default judgment has been entered irregularly, the defendant is entitled to have it set aside as of right without condition. (*White v Western* 2 Q B 647; *Anlaby v Praetorious*(1888) 20 Q.B.D. 764 at page 769 per Fry L.J.; *Fiji Development Bank v Lal* HBC 273 of 2012 per Kumar J)

14. The Court has no discretion to refuse to set aside an irregular judgment.
(*Anlaby v Praetorious* (supra))

Is the judgment regular or irregular?

15. Interlocutory judgment was entered on account of the Defendant's default in filing a defence.
16. Order 19 deals with default of pleadings. The interlocutory judgment appears to have been filed under Order 19 rule 6 which deals with default in the filing of a defence where there is a mixture of claims, all of which are of the kind in rr. 2 – 5 of this Order. A default in the filing of a defence under this rule entitles the Plaintiff to enter final judgment for the liquidated claim, and interlocutory judgment for the unliquidated damages to be assessed. This rule does not apply where the indorsement on the writ contains a claim which falls outside rr. 2 – 5.
17. The Plaintiff claims for amongst other things, a restraining order against the Defendant levying distress for rent, an order for abatement of rent, or alternatively, an order that it be at liberty to apply accrued rentals to repairs. These, in my opinion, do not fall squarely within any of rr. 2 – 5 of Order 19, such that an order for judgment ought to have been sought from the Court.
18. The Interlocutory Judgment of 7 July 2015 reads:

NO STATEMENT OF DEFENCE to the Plaintiff's claim having been filed and/or served by the Defendant herein **IT IS THIS DAY ADJUDGED** that there be interlocutory judgment for the Plaintiff for special damages, general

damages for breach of Lease Agreement and Mediation Agreement, interest and costs to be assessed.

19. The Defendant contends that the interlocutory judgment is irregular in that:

- (i) the claim falls under Order 19 rule 7 requiring an order before judgment is entered, and that;
- (ii) the reliefs listed in the Interlocutory Judgment are not the same as those in the Statement of Claim.

20. Claims that fall under “other claims” pursuant to Order 13 rule 7 and Order 19 rule 7 require an order before entry of judgment in default. A plaintiff cannot enter judgment in default unless it expressly and finally abandons every claim that falls outside rr. 2 – 5. However, a plaintiff is free to choose which relief he wishes to pursue

... and is under no duty to give prior notice of his election to abandon any form of relief which he originally claimed and on the effective abandonment of every remedy or relief outside the description specified in rr. 1 – 4 he is entitled to enter a default judgment under these rules. (*Morley London Developments Ltd. v Rightside Properties Ltd* (1973) 231 E.G. 235, CA)
(*The Supreme Court Practice 1999*, 13/6/2, p. 149)

21. The Interlocutory Judgment of 8 July 2015 shows that the Plaintiff has chosen to pursue only some of the reliefs in its Statement of Claim, with those outside the purview of rr. 2 – 5 being abandoned. Ms.Devan submits that when sealing default judgment, the Plaintiff can decide to

forego any of the reliefs it seeks and pursue those it wishes to proceed with.

22. There is no question that the Plaintiff does have a right to withdraw part of its claim. In fact in Morley (supra), the Court held that a claimant may withdraw part of his claim without notice to the other side, enabling it to take advantage of the provisions of Order 19 rr 2 or 3 in respect of default judgment for liquidated and unliquidated claims. However, in such a case, the default judgment must make it clear on its face that the inappropriate claims have been abandoned.
23. There is nothing either in the material before me, or in the interlocutory judgment filed by the Plaintiff, to say that the Plaintiff has expressly and finally abandoned any of the claims in its statement of claim.
24. What it could have done was, either file a default judgment under Order 19 rule 6, making it clear on its face that it has abandoned the inappropriate claims, or, bring an application by way of summons or motion for interlocutory judgment under Order 19 rule 7.
25. It has done neither of these things and I consider that the interlocutory judgment is irregular and must be set aside as of right, without condition and without the need for an affidavit of merits. I have no discretion to refuse setting aside in light of the irregularity in the default judgment. (Anlaby v Praetorious (supra)) In
26. In White (supra), the Court stated:

where there is an irregularity in the entry of default judgment the party against whom judgment is obtained is entitled to have the judgment set aside and

the Court should impose no terms whatsoever on him, not even contingent term such as that the costs should be costs in the cause.

Orders

1. The interlocutory judgment entered by the Plaintiff against the Defendant on 7 July 2015 is hereby set aside unconditionally for irregularity.
2. The Defendant is to file and serve a statement of defence within 14 days from the date of this judgment.
3. The Plaintiff is to file its reply 14 days thereafter.
4. No order as to costs.
5. This case is adjourned to 28 October 2016 at 9am for mention.




S.F. Bull
Acting Master