[2022] JMSC Civ. 97

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018 HCV03307

BETWEEN	**KARL BERNARD**	**CLAIMANT**
AND	**PETER WHYTE**	**DEFENDANT**

Miss Oksana Kennedy instructed by Jacobs Law for the claimant.

Mr Glenroy Mellish for the defendant.

Heard May 19, 2022, and June 30, 2022

Setting Aside Default Judgment under CPR 13.3. Whether the defence has a real prospect of success. If the defence has a real prospect of success, has the applicant applied to set aside the default judgment as soon as it was reasonably practicable. Does the applicant have a good reason for not filing an acknowledgement of service within the time stipulated by the CPR

CORAM: JARRETT, J (Ag)

INTRODUCTION

[1] Judgment in default of acknowledgment of service was entered in the claimant's favour on December 6, 2018. This is an application by the defendant to set aside that judgment. The application was filed on December 4, 2020. It is supported by an affidavit sworn by the defendant on November 23, 2020 and filed on January 10, 2022. Exhibited to the affidavit is a copy of the defendant's proposed draft defence.

Factual background

The claim

[2] Karl Bernard is the claimant. He is from Old Harbour in the parish of St Catherine. He sued the defendant Peter Whyte in negligence, by way of claim form filed on August 30, 2018. He pleads in his particulars of claim that on March 16, 2018, he was driving his 2007 Honda Accord motor car along the Bustamante Highway in Clarendon and on reaching the vicinity of Four Paths, the defendant, who was driving a 2007 Nissan Dualis motor car negligently collided with him.

[3] The claimant claims to have suffered whiplash injury to his neck; lower back strain, blunt trauma to his right knee; right hip strain and avulsion fracture of the 1st metatarsal bone of the right foot. He pleads special damages of $82, 000.00 which includes medical expenses and transportation costs.

Procedural background after the filing of the claim

[4] The claim form accompanied by the particulars of claim, a form of acknowledgment of service, a form of defence and the prescribed notes for defendants, were personally served on the defendant on September 13, 2018, in compliance with CPR 8.16. The defendant not having filed an acknowledgment of service within 14 days of service as required by CPR 9.3, on December 6, 2018, the claimant filed a Request for Default Judgment. As stated earlier, that judgment was entered on December 6, 2018. It was served personally on the defendant on May 4, 2019, along with a notice of assessment of damages indicating that the assessment was scheduled to take place on June 1, 2020.

[5] Preparatory to the assessment of damages, a witness statement of the claimant dated May 4, 2020, and filed on May 8, 2020 was personally served on the defendant on May 19, 2020. An acknowledgment of Service was filed by the defendant on June 1, 2020 (the date of the assessment of damages) and signed by his attorney-at-law, Mr Glenroy Mellish. It does not provide a complete answer to the questions that ask when he received the claim form and the particulars of claim. The answer to both questions is “2018”.

[6] The court's records indicate that at the assessment of damages on June 1, 2020, both parties and their attorneys-at-law were in attendance. The Minute of Order states that the hearing did not proceed and was adjourned to a date to be fixed by the Registrar, pending the defendant's application to set aside the default judgment. No application to set aside the judgment had been filed and served up to that point in the proceedings. It was not until December 4, 2020, that the defendant filed his application to set aside the default judgment. It carried the date of December 2, 2020. It was unaccompanied by an affidavit. An affidavit of the defendant in support of the application was sworn by him on November 23, 2020 but filed almost one year and two months later on January 10, 2022.

[7] The claimant secured a date of March 15, 2022, for the adjourned assessment of damages and on October 22, 2021, served a Notice of Adjourned Hearing on the defendant's attorney -at- law. Also served on that day was a Notice of Intention to Tender Hearsay Statements made in Documents which was filed on October 11, 2021. On the adjourned date for the assessment of damages on March 15, 2022, the hearing of the defendant's application was scheduled for May 19, 2022. A further date for the assessment was scheduled for July 26, 2022, but made conditional on the outcome of the defendant's application.

The application

[8] In his application to set aside the default judgment, the claimant relies on the following grounds: -

a) The defendant has a real prospect of successfully defending the claim.

b) That the defendant consulted attorneys-at-law as soon as he received the court papers and the said attorneys promised to deal with the matter. They did not provide the assistance in dealing with the claim that he has now come to realise was necessary.

c) As soon as the defendant received the notice of the hearing on June 1, 2020, he retained his present attorney-at-law to appear on his behalf at the hearing.

[9] It is important to set out *in extenso*, paragraphs 3 to 7 of the affidavit of the defendant in support of his application. I do so below: -

3. That I received the court documents and handed them to the lawyer who was representing me in a connected matter at the May Pen Traffic Court. I heard nothing further from him and was served with further papers in late May 2020 to attend court on June 1, 2020.
4. I promptly retained my present attorney-at-law who represented me at the hearing. I relied on the fact that the papers were handed to my previous lawyer.
5. I am attaching hereto a copy of the Defence I will rely on if given an opportunity to defend the matter.
6. On March 16, 2018, at about 8.30pm I was travelling in an easterly direction towards May Pen on Bustamante Highway. At about 150 meters past the Four Paths turn off I noticed a motor vehicle approaching me from the opposite direction. The motor vehicle was travelling on the wrong side of the road, that is coming in my lane and thereby likely to cause a head-on collision. I swung away from him but in that same instance the car being driven by the claimant, who was travelling in the same direction as the car I just avoided, was also travelling on the wrong side of the road. I swung further to the left but was unable to avoid the collision with the claimant's motor vehicle. The accident was unavoidable by me and will further say that the claimant himself was negligent.
7. In these circumstances I am asking the court to grant the orders we are seeking and to afford me the chance to have my matter tried.

The relevant provisions of the CPR

[10] Although not cited, CPR 13.3(1) and (2) are the rules under which the defendant's application is made. They provide as follows: -

13.3 (1) The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.

(2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:

a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.

b) given a good explanation for the failure to file an acknowledgment of service or a defence as the case may be

[11] CPR 13.4 (2) and (3) stipulate respectively that an application to set aside a default judgment must be supported by affidavit evidence and the affidavit must exhibit a draft of the proposed defence.

The defendant's submissions

[12] Counsel for the defendant Mr Mellish made both oral and written submissions. In his written submissions he concedes that the defendant failed to file an acknowledgment of service within 14 days of service, but he states that the defendant attributes that failure to the "neglect "of his "other attorneys-at-law in a traffic court case arising from the same motor vehicle accident with which this case is concerned." He submits further that in "late May 2020" the defendant was served "papers for the Assessment of Damages on June 1, 2020", and it was then that he became aware of the existence of the default judgment. He asks the court to take into its consideration the COVID 19 pandemic and the effect it had on "slowing down almost all activities and therefore being largely responsible for the application not being made until December 4, 2020".

[13] Counsel focused his attention mainly on the proposition that the defendant has a defence that has a real prospect of success. He argued that the court is faced with two different versions of how the accident on March 16, 2018 occurred and that it is only just that the defendant has his credibility tested against that of the claimant. He relied extensively on the recent court of appeal decision in **Ogansulu v Gardner [2022] JMCA Civ 12** in which the court of appeal, in a decision written by D Fraser JA, reemphasised that in determining whether the proposed draft defence has met the threshold test of having a real prospect of success, it must not be fanciful and must be more than just merely arguable.

[14] Mr Mellish declined my invitation to submit on whether the defendant acted in accordance with CPR 13.3(2)(a) and made his application to set aside the default judgment as soon as reasonably practicable after becoming aware of the default judgment. He chose instead to direct his attention to the provisions of CPR 13.3(2)(b). Counsel took me to paragraph 3 of the defendant's affidavit and said that the reason the defendant did not acknowledge service within the timeline stipulated by the CPR was because he did not hear anything further from his other attorney-at-law who was representing him at the May Pen Traffic Court. He said that that attorney-at-law was "less than quick" in filing an acknowledgment of service. While acknowledging that the defendant had a duty to follow up with his attorney, Mr Mellish implored me not to "visit upon the defendant the dereliction of the attorney".

The claimant's submissions

[15] Counsel Miss Kennedy started her oral submissions by rhetorically asking whether the defendant's evidence discloses that he has a defence with a real prospect of success. In her view, his affidavit amounts only to a "summary recollection of the events on the night in question". She argued that he offered no cogent evidence to strengthen the case from being fanciful to one having a real prospect of success. Miss Kennedy first took me to the decision in **International Finance Corporation v Utexafrica S.P.R.L [2001] EWHC 508.** In both her written and oral submissions, she placed heavy reliance on the dicta of Moor-Bick J at paragraph 8 of that

judgment in which the learned judge said that to meet the test in rule 13.3(1)(a) of the English Civil Procedure Rules, the defence must be something better than merely arguable. This rule is in similar language to our CPR 13.3(1). Moor-Bick J went on to say that the rationale for this is that a person who obtains a default judgment has: “something of value and in order to avoid injustice he should not be deprived of it without good reason “.

[16] In addressing the provisions of CPR 13.3(2)(a), Miss Kennedy argued that the defendant did not apply to set aside the judgment as soon as reasonably practicable. She pointed to the affidavit of service filed on September 5, 2019, which indicates that the defendant was served personally with the default judgment on May 4, 2019. Counsel insisted that that was the date the defendant became aware of the default judgment. She stoutly contended that having become aware of the default judgment on May 4, 2019, the defendant ought to have applied to set it aside long before he did on December 4, 2020, which, she said, was almost one and a half years later. Counsel placed reliance on the decision of Stamp J in **Seymour Ferguson v Ameco Caribbean Inc and Keeble Dixon [2020] JMSC Civ 107**, in which the learned judge found that a delay of 2 months and 2 weeks in making an application to set aside a default judgment was unduly long. On appeal, the Court of Appeal in **Ameco Caribbean Inc v Seymour Ferguson [2021] JMCA 53** upheld Stamp J’s finding in this regard. Counsel compared that case with the instant one and said that the delay is indeed unduly long. She argued further that the defendant has not provided any evidence giving the reasons for not filing his application in a reasonably practicable time.

[17] As to CPR 13.3 (2)(b), counsel said that the defendant has not proffered a good explanation for his failure to file an acknowledgment of service on time. She referred to the decision of the court of appeal in **Ken Sales & Marketing Limited v James & Company (A Firm) delivered on December 20, 2005,** and submitted that in that case**,** a delay of one month due to the inadvertence of the attorney-at-law was not found by the court to be a good explanation. Miss Kennedy argued that the defendant was served personally, and it is to be taken that he read the

documents he received including the prescribed notes to the defendant. She was not impressed with the defendant's evidence that he gave the documents served on him to his attorney who represented him in the traffic court matter. She contended that defendant has not given any evidence that he in fact retained that attorney-at-law to represent him in this civil suit. She said that he did not do his due diligence in ensuring that he was represented by counsel.

[18] Miss Kennedy in her written submissions acknowledged the decision **in Evan v Bartlam [1937] 2 All ER 646**, which is often cited for the principle that until a court has decided a matter on its merits, it retains the power to set aside a judgment obtained consequent upon a failure to comply with procedural rules. She however sought to remind the court that when faced with an application to set aside a default judgment, the enquiry does not end at a finding that the defence has a real prospect of success. Issues of delay and an explanation thereof, must be "weighed in the equation". For this proposition, counsel cited the court of appeal decision in **Flexnon Limited v Constantine Michell and Others [2015] JMCA App 55.** In closing she asked me to refuse the application.

The issues

[19] The issues before me for determination are: whether the threshold test has been met by the defendant, and if it has; whether he applied to set aside the default judgment as soon as reasonably practicably after becoming aware of it and; whether he has provided evidence demonstrating a good explanation for failing to acknowledge service of the claim form within the time limited by the CPR.

Analysis and discussion

[20] There is no dearth of judicial authority in this area of the law. From the authorities, some of which were helpfully cited by both counsel, I cull the following principles:

a) The primary consideration or threshold test on an application to set aside a default judgment is whether the defendant has a defence which has a real prospect of success. **(Ogansulu v Gardner [2022] JMCA Civ 12; June Chung v Shanique Cunningham [2017] Civ 22)**

b) A defence with a real prospect of success is one that is more than merely arguable. It should have conviction**. (International Finance Corporation v Utexafrica S.P.R.L [2001] EWHC 508).** It should not be fanciful. **(Swain v Hillman and Another [2001] All ER 91**). It should make good sense and good logic. **(Sasha-Gaye Saunders v Michael Green And Others Claim No 2005HCV2868, delivered February 27, 2007**).

c) The burden of proving that the threshold test has been met is on the defendant. (**Merlene Murray- Brown v Dunstan Harper and Winsome Harper [2010JMCA App1**)

d) The defendant's application must be supported by an affidavit which demonstrates that he has a defence which meets the threshold test. Exhibited to that affidavit must be a draft defence (**Joseph Nanco v Anthony Lugg and B & J Equipment Rental Limited [2012] JMSC Civil 81; Ogansulu v Gardner [2022] JMCA Civ 12)**

e) Although the court must not engage in a mini trial, in determining whether the defence meets the threshold test, the court should consider all the evidence before it and whether the defence is contradicted by documents that are being relied upon. (**Joseph Nanco v Anthony Lugg and B & J Equipment Rental Limited [2012] JMSC Civil 81.**

f) If the proposed defence meets the threshold test, the court must go on to consider whether the defendant applied as soon as reasonably practicable to set aside the default judgment after becoming aware of it. (**June Chung v Shanique Cunningham [2017] Civ 22)**

g) If the defence does not meet the threshold test, the enquiry ends. **(June Chung v Shanique Cunningham)**

h) In considering whether the defendant has applied to set aside the default judgment as soon as reasonably practicable after becoming aware of it, the court looks at whether in the circumstances of the case, the defendant acted with reasonable celerity in filing his application. This involves taking into account the reasons advanced for any delays. (**Flexion Limited v Constantine Michell and Others [2015] JMCA App 55)**

i) In its analysis, the court must consider the overriding objective of the CPR and balance the risk of prejudice to both the claimant and the defendant if the application is granted as against if it is not. (**Russell Holdings Limited v L & W Enterprise Inc and ADS Global Limited [2016] JMCA Civ 39)**

Has the threshold test been met?

[21] I start my analysis of the defendant's application by asking the question Miss Kennedy posed rhetorically: Does the defendant's evidence disclose that he has a defence with a real prospect of success? His evidence is that at 8pm on the night in question, he was travelling towards May Pen when he noticed two motor cars coming towards him in his lane from the opposite direction on the "wrong side of the road". He goes on to say that he "swung away" from the first motor car, but at that same time, there came the claimant who was driving the second motor vehicle coming towards him from the opposite direction and also on the "wrong side of the road". He "swung further to the left" but was unable to avoid the collision with the claimant's motor car. He says the accident was "unavoidable" by him and the claimant was "himself negligent".

[22] Although he does not expressly say so, implicit in the defendant's evidence is that he was on the "right side" of the road, which would have had to be on his left going towards May Pen. He does not say in which direction he swung when the first motor car coming from the opposite direction came towards him on his side of the road. However, the fact that he says that he "swung further to the left" when the

claimant who was also travelling on the "wrong side" approached him, leads me to conclude that his evidence is that in the first instance he swung to his left and in the second instance he swung further to his left.

[23] The defendant's account of how the accident occurred does not make good sense to me. Why did he not swerve to the right rather than to the left, if two motor vehicles are coming head on towards him on his side of the road from the opposite direction? Logically, one would expect that in a scenario such as this, the defendant would have swerved to the right to get out of the way of these two motor cars which are approaching him from the opposite direction and coming head on towards him on his left side of the road. It would seem to me that if he swerved to the left side of the road not once but twice, that manoeuvre would have placed him off the road entirely and the accident would have therefore occurred while both vehicles were off the road. Frankly, I do not find his evidence logical or convincing. I therefore find that the defendant has not by his evidence discharged the burden on him to prove that he has a defence with a real prospect of success.

[24] Having found that the defendant's evidence has not met the threshold test, I can end the enquiry here. But should I be wrong in my analysis and findings in relation to the defence, I will go on to consider whether the defendant has acted as soon as reasonably practicable after becoming aware of the default judgment as provided by CPR 13.3(2)(a) ; and whether he has given a good explanation for not filing an acknowledgment of service on time, in accordance with CPR 13.3(2)(b) .

Was the application made as soon as reasonably practicable?

[25] In determining whether the defendant applied to set aside the default judgment as soon as reasonably practicable after becoming aware of it, the authorities require that I consider whether he acted promptly or swiftly in the circumstances of this case. The defendant was served personally with the default judgment on May 9, 2019. This is evident from the affidavit of service of Balzie Powell, Assistant Bailiff

for the Parish of Clarendon which was filed on September 5, 2019. This evidence is unchallenged. The defendant gives absolutely no evidence in relation to the service on him of the default judgment. I find this startling, given the provisions of CPR 13.3(2)(a).

[26] Counsel Mr Mellish argues in his written submissions that it was in May 2020 that the default judgment along with the "papers for the assessment of damages" for the June 1, 2020, hearing was served on the defendant. When I brought to his attention the evidence of Balizi Powell contained in his affidavit of service, counsel rightly conceded and said that he will "defer to the records on the question of the date of service of the default judgment". Not only did the defendant choose not to give any evidence in relation to when he was served with the default judgment, he likewise chose not to give any evidence as to why his application to set it aside was filed on December 4, 2020, without an affidavit, the latter document being filed over one year and one month later, on January 10, 2022. Counsel Mr Mellish sought to rely in his written submissions on the COVID 19 pandemic as the reason for the late filing of the defendant's application. There are two problems with these submissions. Firstly, this is not evidence, but counsel's submissions. The defendant has provided not even a hint of any evidence to suggest that the COVID 19 pandemic affected his ability to act swiftly after he became aware of the default judgment. Secondly, the defendant was personally served with the default judgment on May 9, 2019, ten months or so prior to the first COVID 19 case on the island. As pernicious as the COVID 19 pandemic has been, the defendant cannot prey it in aid.

[27] Mr Mellish seemingly recognised the defendant's dilemma when he opted not to submit orally on whether the defendant had satisfied the provisions of CPR 13.3(2)(a). It is plain that there is no evidence to persuade me that the defendant acted as soon as reasonably practicable after he was served with the default judgment on May 9, 2019. While the application was filed on December 4, 2020, the affidavit in support was not filed until January 10, 2022. I cannot imagine why there was such a long delay. No explanation was provided. CPR 13.4(2) makes it

mandatory that an application to set aside a default judgment be accompanied by evidence on affidavit. The practical effect of this rule is that it was not until January 10, 2022, that the defendant's application can be considered to have been properly filed, since an application under CPR 13.3 is one accompanied by an affidavit in support. It meant that the defendant's application was filed over two years and seven months, after he was served with the default judgment. In the absence of any explanation as to why the defendant did not apply sooner, I have no hesitation in finding that the delay in this case was unduly long and that the defendant has not applied to set aside the default judgement as soon as reasonably practicable. Before leaving this issue, I have to say that I find it mindboggling that when the matter came before the court on June 1, 2020, for the assessment of damages it was adjourned to allow the defendant the opportunity to file his application to set the default judgment. He took nearly one year and seven months to have an application properly before the court. To my mind this is suggestive of unbridled disrespect and disregard for the court and its rules. This cannot be countenanced.

Is there a good explanation for not filing the acknowledgement of service within the time limited by the CPR?

[28] The defendant's explanation for not filing an acknowledgement of service on time is to blame the attorney-at-law who represented him in the traffic court matter for his neglect. He received the claim form, the particulars of claim and the accompanying documents on September 13, 2018, and on his evidence gave them to his attorney-at-law in the traffic court matter. He said he heard "nothing further from him" and that he relied on the fact that he had handed over the documents to him.

[29] Phillips JA in **Merlene Murray- Brown v Dunstan Harper and Winsome Harper [2010JMCA App1** in commenting on the statement made at first instance by the trial judge that the inadvertence of counsel was not a good explanation for failing to file a defence on time said that: -

> "The fact is that there are many cases in which litigants are left exposed and their rights infringed due to the attorney's errors made

> inadvertently, which the court must review. In the interest of justice and based on the overriding objective, the facts of a particular case and depending on the question of the 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 intentional. "

The question in this case therefore is whether the defendant's stated reliance on his attorney in the traffic court matter and Mr Mellish's contention that that attorney was derelict in his duty, places the defendant in the position of deserving the court's protection.

[30] The defendant does not give any evidence as to whether he contacted the traffic court matter attorney in the year and eight months, between September 13, 2018, when he was served with the claim form, particulars of claim and accompanying documents and, May 2020, when he received further documents indicating that the assessment of damages would take place on June 1, 2020, and if he did, what was the attorney's response. I find this quite remarkable. In the absence of any such evidence I am left to conclude that he did not follow up with this attorney-at-law. In fact, I agree with Miss Kennedy that the defendant's evidence does not even say whether the traffic court matter attorney was retained by him to handle this civil suit.

[31] The accompanying documents the claimant received with the claim form and particulars of claim included the prescribed notes for defendants. Those notes break down in lay man's language, the nature of the claim form and particulars and explains the next steps a defendant must take if he intends to defend the claim. In bold letters at the top of that document are the words: "Action to be taken on receipt of this form"**.** The second sentence after that contains the very clear warning, in bold letters: "If you do nothing, judgment may be entered against you". The document then goes on to explain that if a defendant intends to defend the claim, he must within 14 days' file with the registry of the Supreme Court an

acknowledgment of service and he must file a defence within 42 days. I agree with Miss Kennedy, that the defendant must be presumed to have read these prescribed notes.

[32] I cannot imagine that in this day and age, a person is served with court documents and simply "hands them" to an attorney -at-law and takes no responsibility for what happens next. In fact, Miss Kennedy is right to say that there is no evidence that the traffic court matter attorney to whom the documents were handed was retained to handle this civil suit, although this is the inference Mr Mellish wishes me to draw from his submissions. The prescribed notes the defendant received on September 13, 2018, made it clear what his next steps were. He had a responsibility to follow up with the attorney. In an application to set aside a default judgment, where the court will consider whether the defendant has a good explanation for not filing an acknowledgment of service on time, to simply say that the documents were handed to an attorney on whom you relied, is not , without more, a good explanation. To borrow from the language used by Skyes J (as he then was) in **Sasha Gay Saunders v Michael Green et al** , the conduct of the defendant throughout these proceedings can only be described as sluggish and reflective of a general state of lassitude.

Balancing the risk of prejudice

[33] The claimant has in his favour a default judgment since December 6, 2018. The accident took place in March 2018, over four years ago. In balancing the risk of prejudice, I consider that after all this time, the claimant may well have difficulties finding witnesses to give evidence on his behalf, were this matter to go to trial. Besides, after four years, memories will have faded. I consider as well from the defendant's perspective that he is faced with a judgment that will likely affect him financially. In the end however I believe a greater prejudice will be meted out to the claimant were I to set aside the default judgment. I place great significance on the defendant's dilatory conduct throughout these proceedings. I do not consider that in all the circumstances, such conduct is deserving of the court's protection.

[34] I make the following orders: -

a) the defendant's application to set aside the default judgment is refused.

b) cost to the claimant to agreed or taxed.