



[2019] JMSC Civ 256

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017HCV01057

BETWEEN	COLLEEN BROWN	CLAIMANT
AND	JASON SMITH	FIRST DEFENDANT
AND	SHARON GORDON	SECOND DEFENDANT

IN CHAMBERS

Miss Olivia Derrett instructed by Oswest Senior Smith & Co for the Claimant/Respondent

Miss Sharon Gordon instructed Gordon & Gordon Associates for the 1st Defendant/Applicant

Heard: December 2, 2019 and December 3, 2019

Civil Procedure - Application to set aside order for substituted service and order to extend the validity of the claim form. CPR 11.16

Master T. Mott Tulloch-Reid (Ag)

[1] The First Defendant has applied to the Court to set aside the order of Master Harris which was made on December 19, 2018, extending the life of a claim form which was filed on March 29, 2017 and permitting service by a specified method on the First Defendant's mother, who appears was also wrongly named.

- [2]** The application was made without notice to the first Defendant and is seemingly being made pursuant to Civil Procedure Rule 11.16. A party who was not present when an order was made may apply to set aside the order (CPR 11.16 (1)). The application must be made not more than 14 days after the date on which the order was served on the applicant. As per the Affidavit of Service sworn to by Bryden Greenland on March 19, 2019, the Formal Order was served on February 20, 2019. The Acknowledgment of Service says that the Claim Form was received on February 19, 2019 and I will assume the Formal Order was also received by the Defendant on the same day. The application to set aside the Order of Master Harris would therefore have to be made on or before March 6, 2019. It is to be noted that the application was made on March 22, 2019 when the Notice of Application was filed in Court.
- [3]** The attorneys-at-law for the parties both made mention in passing of Part 9.6 of the CPR which deals with disputing the jurisdiction of the Court. In applications of that kind, the application is to be made within the period for filing the defence that is forty-two (42) (CPR9.6(3)). However, having carefully perused the Notice of Application and the Amended Notice of Application filed by the First Defendant, I see no mention of an application to dispute the jurisdiction of the Court and so I must consider that the application is being made pursuant to CPR 11.16 and the application must be made within fourteen (14) days of having being served with the Order.
- [4]** If the Application is not made within time and no applications are made for orders to extend the time within the application is to be made, it will be accepted that the First Defendant has accepted the status quo and will proceed in the usual manner. The First Defendant having been fifteen (15) days late in making the application is now shut out and the result is that he can no longer rely on his limitation defence. The fact though is that by virtue of his tardiness, the limitation defence would not be open to him because the Claim Form as extended would have made it valid when it was served.

[5] Ms Gordon then raises the point that the Claim Form that was served on the First Defendant's mother did not bear the certificate showing the period for which the validity of the Claim Form had been extended as is mandated by Civil Procedure Rules 8.15 (5) (a). Ms Derrett did not raise any submissions to refute this point. The practice is usually that attorneys serve the Claim Form without the certificate but with the order which would indicate the period for which the validity of the Claim Form has been extended. I have considered the absence of the certificate a procedural irregularity which can be overlooked in the interest of justice. By serving the First Defendant through his mother with the Formal Order, the First Defendant would have come to the knowledge that the Claim Form had been extended.

[6] I wish to comment on the order of Master Harris made on December 19, 2018. The validity of the Claim Form was extended from December 19, 2018. The Claim Form was filed on March 29, 2017 and would have at that time expired on March 28, 2018. The application as it relates to extending the validity of Claim Form was filed on March 27, 2018 prior to the expiration of the validity of the Claim at that point in the time order should have been made to extend from March 27, 2018 to September 28, 2018. There were no other applications for further extensions and I see from my reading of the Court's file that when the matter came up on October 25, 2018 when by then the validity of an extended Claim Form would have expired, Master Harris did not extend to September 2018 nor did the Claimant ask for a further extension, instead the matter was adjourned because there was a defect in the Claimant's application in that relevant evidence was missing from the Affidavit and a Supplemental Affidavit was to be filed. When the matter came up on December 13, 2019 the Supplemental Affidavit was to be filed. When the matter came up on December 13, 2019 the Supplemental Affidavit was still missing and the matter was further adjourned to December 19, 2018. When the matter came up on December 19, 2018, Master Harris amended the Further Amended Notice of Application filed December 12, 2018 to at paragraph 1 change "from the date hereof" to "December 19, 2018". I can only conclude that that was an attempt to assist the Claimant as the Claim Form would have already been dead and buried.

The validity of a claim from can only be extended if it is alive and by December 19, 2018 is was not.

[7] The Claimant's approach to this case has been untidy and irregular and it is quite unfortunate that I have to, in the circumstances, permit her to proceed. I am only permitting the Claimant to proceed with her claim because the First Defendant's application is late. Had it been on time, the judgment would have been different.

[8] I therefore order as follows: -

- a. The order of Master Harris made on December 19, 2018 stands.
- b. The First Defendant's Defence filed on November 21, 2019 is allowed stand.
- c. The stand parties are to attend mediation on or before February 28, 2020.
- d. Should mediation be unsuccessful the parties are the attend Case Management Conference on March 16, 2020 at 11:00 am for ½ hour.
- e. The Claimant is to pay the First Defendant costs in the application in the amount of \$50,000.00 on or before January 14, 2020 failing which her statement of case will be struck out.
- f. The Second Defendant is removed as a party in the claim.
- g. The First Defendant's attorneys-at-law are to prepare file and serve the Formal Order.