[2017]JMSC Civ 187

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010HCV06103

BETWEEN	**ROHAN BROWN**	**CLAIMANT/ RESPONDENT**
AND	**NICHOLAS LARAQUE**	**DEFENDANT/ APPLICANT**

IN CHAMBERS

Peter Marshall instructed by Samuda & Johnson for the Claimant/Respondent

Anthony Pearson instructed by Pearson & Company for the Defendant/Applicant

HEARD 10th November, 2016, 25th January, 2017, 20th March, 2017 and 5th May, 2017

Application to Set Aside Default Judgment, Rule 13.3 of the Civil Procedure Rules (CPR)

MASTER MASON (AG.)

THE FACTS

[1] The Claimant is the owner of a motor vehicle registered 0614 EC. On December 1, 2007 while the Claimant was lawfully parked on the left hand soft shoulder of the Coopers main road in the vicinity of the Star Fish Hotel, Falmouth in the parish of Trelawny, the Defendant/Applicant so negligently drove, managed and or controlled his motor vehicle licensed 6192 EU along the said road that he collided with the Claimant's vehicle. As a result of the collision the Claimant

sustained personal injuries, suffered loss of income, damage and has been put to expense

[2] The Claimant and the Process Server Mr. Patterson after extensive enquiries were unable to effect service on the Defendant/Applicant. They were informed by the residents in the area that the Defendant/Applicant had migrated.

[3] On July 20 2011, the Claimant applied for and was granted permission by Master Audre Lindo to serve the Defendant's/Applicant's insurers Advantage Insurance Company Limited by way of Substituted Service. On August 9, 2011, the Defendant's/Applicant's insurers were served by registered post at 4-6 Trafalgar Road, Kingston 5 in the parish of Saint Andrew with the following documents:

(i) Claim Form and Particulars of Claim filed December 10, 2010

(ii) Notice to the Defendant

(iii) Prescribed Notes for the Defendant

(iv) Acknowledgment of Service Form

(v) Blank Defence

[4] On November 8, 2011 a search was conducted at the Supreme Court Registry on the Claimant's behalf which revealed that the Defendant/Applicant had not filed an Acknowledgment of Service or Defence in the matter. Subsequently, on November 8, 2011 Default Judgment was entered for the Claimant against the Defendant/Applicant. On January 17, 2013, Final Judgment was entered for the Claimant after an Assessment of Damages hearing. The Claimant obtained Judgement in the amount of One Million Four Hundred and Seventy-Four Thousand Four Hundred and One Dollars and Eight Cents ($1,474,401.08) with interest thereon at three percent (3%) per annum from December 1, 2007 to January 17, 2013 and the amount of Four Million Two Hundred and Eighteen Thousand Eight Hundred Dollars ($4, 218,800.00) with interest thereon at the rate of three percent (3%) per annum from August 31. 2011 to January 17, 2013.

An Order for Seizure and Sale was made on February 28, 2014, but attempts to serve same was unsuccessful. On February 5, 2013 the sum of Two Million Dollars ($2,000,000.00) was paid by the Defendant's/Applicant's Insurance Company towards the partial settlement of the judgment. To date the Judgment is still not completely satisfied. The Claimant has on September 8, 2015 filed and serve a Judgment Summons in bid to move the matter forward.

[5] On January 15, 2016 the Defendant filed a Notice of Application for Court Orders seeking the following orders:

i That Default Judgment entered on November 8, 2011 be set aside

ii That the Defendant/Applicant be granted leave to file his Defence out of Time

iii That costs be costs in the claim

THE LAW

[6] The power of the Court to set aside a Default Judgment regularly entered is found in Part 13 of the CPR (2002) amended in 2006 Rule 13.3 states as follows:

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 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.

3. Where this rule gives the Court power to set aside a judgment, the Court may instead vary it.

[7] In an application to set aside a judgment entered under part 12 of the Civil Procedure Rule (CPR), the primary consideration is whether the defence has any real prospect of successfully defending the claim.

[8] In the case of **Merlene Murray Brown v. Dunstan Harper and Winston Harper** [2010] JMCA App 1 Phillips J. A, said:

> *"The focus of the Court now in the exercise of its discretion is to assess whether the applicant has a real prospect of successfully defending the claim, but the court must also consider the matters set out in 13.3 (2) (a) and (b) of the rules."*

In Blackstone's Civil Practice, 2005 as well as the case of **International Finance v. Utexafrica Sprl** [2001] CLC 1361, where it was spelt out that in order for there to be a determination that there is a real prospect of success, the prospect must be better than merely arguable.

[9] The concept of 'real prospect' was further defined in the case of **ED&F Man Liquid Products v Patel & ANR** [2003] C.P. Rep 51**.** Lord Potter stated in that case that:

> *"Real prospect does not mean some prospect. Real prospect is not blind or misguided exuberance. It is open to the Court, where available to look at contemporaneous documents and other material to see if the prospect is real."*

The Court pointed out that while a mini-trial was not to be conducted that did not mean that a Defendant was free to make any assertion and the Judge must accept it. Later on in his judgment Lord Potter said:

> *"However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents.*

If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable…"

[10] In making its decision therefore, the Court must look at the Claim, the draft Defence (if available) and the merits of the case that may be proposed in the affidavit evidence.

DOES THE DEFENDANT HAVE A REAL PROSPECT OF SUCCESS

[11] In the instant case, the application to set aside the Default Judgment is supported by an affidavit of the Defendant/Applicant Mr. Nicholas Laraque, no draft Defence was exhibited to the Affidavit. A Defence goes to the merit of any claim. A Defendant who fails to file a draft Defence robs himself of putting forward his version of the incident and denies himself of any real prospect of successfully defending the claim.

[12] In the case of **Sasha-Gaye Saunders v Michael Green and others** 2005HCV02868 Sykes J, at paragraph 24 stated that in the absence of some explanation for the failure to file a Defence or Acknowledgement of Service, the prospect of succeeding in having the judgment set aside should diminish. He opined also that if the delay is quite gross then this should negatively impact on successfully setting aside the Judgment.

[13] In examining paragraphs 10-15 of the Defendant's/Applicant's affidavit, he submits that he was lawfully driving his motor vehicle registered 5192 EU when he was hit in the rear by another motorist, the impact of that collision pushed his vehicle into the Claimant's car which knocked him out and caused him to be hospitalised. He further states that he was driving with due care and attention and that the accident was not caused by his negligence.

REASONS FOR THE DELAY

[14] At paragraphs 5-7 of his affidavit, the Defendant/Applicant asserts that he was never personally served with the Claim Form and Particulars of Claim. The

Pleadings were served by substituted means on his insurers Advantage General Insurance Company Limited. He further asserts that his insurers never contacted him after being served and that he first became aware of the proceedings sometime in October, 2015 when a taxi-man served him with papers at his home. The Defendant/Applicant claims that he took the documents to his Attorney-at-Law.

[15] The Defendant/Applicant was served through his insurance company by substituted method, as he could not be located. That method of service is deemed proper service in the circumstances. The Order for Substituted Service was granted by Master A Lindo on July 20, 2011.

[16] Paragraph 8 of the Affidavit of Christopher Livingstone Samuda avers that the Insurance Company did inform the Defendant/Applicant of the claim against him by way of a letter dated April 26, 2016 from the Insurance Company. That letter was exhibited to Mr. Samuda's affidavit. The Applicant claims the letter to be 'hearsay' and that it must not be relied upon.

[17] In the case of **Victor Gayle v Jamaica Citrus Growers & Anthony McCarthy** 2008HCV05707 at paragraph 36 a similar objection was raised, but the learned judge disagreed that the affidavit evidence was hearsay evidence and went on to say that she was satisfied that the impugned paragraphs adequately identify the source of the information and belief as is the position in the instant case. It is well established in case law that an Affidavit of Merit, similar to Mr. Samuda's is accepted provided the source of the information disclosed is adequately identified and believed to be true.

[18] The Defendant/Applicant may not have been aware of the claim, but his insurers were. The insurers have not provided any good reasons for not filing an Acknowledgment of Service and Defence in draft for the Defendant/Applicant. The fact that he was not served personally is not a good explanation since the Insurers were served by substituted means since August 9, 2011.

DELAY

[19] It is noted, however, that over five (5) years had elapsed since Judgment had been entered against the Applicant. The matter had proceeded to Assessment of Damages and the Claimant had already received Final Judgment and part of the Judgment sum.

[20] For the Defendant/Applicant to file an application to set aside a regularly obtained judgment after more than five (5) years had passed is an inordinately long time. Such a gross delay will clearly have a negative impact on successfully setting aside the Judgment.

[21] In the Barbadian case of **Clarke v Hinds et al** BB 2004 CA 15 it was pointed out that a delay of one year is viewed as an inordinate delay. In that case it was held that a delay of five (5) years in seeking to set aside a Default Judgment regularly obtained was excessive. The Appellate Court took the view that irrespective of the merits, delay could be a decisive factor if it seriously prejudices the Claimant or third party rights. Additionally that there could no longer be a fair trial especially where the resolution of the dispute depended on the memories of the witnesses who are going to give oral evidence of an event that happened in a moment of time such as is the case in most accident litigation.

[22] The account of the accident as set out in Mr. Samuda's affidavit infers that the accident was caused by the negligence of the Defendant/Applicant and that the allegation that the collision was caused by another vehicle hitting the Defendant's/Applicant's vehicle from the rear is wholly inconsistent with the Police Traffic Accident Report prepared by the Trelawny Division of the Constabulary Force. A copy of the report was exhibited with Mr. Samuda's Affidavit. The said report that was referred to by the Defendant/Applicant as 'hearsay'.

[23] I am of the view that the accident report produced by the Police is credible evidence. It does not make any mention of a third vehicle impacting the

Defendant's/Applicant's vehicle. It is therefore open to the Court where available to look at contemporaneous documents and other material for assistance in arriving at an informed decision. In the case of **ED&F Man Liquid Products v Patel & ANR** (Supra) it was declared that if the defence has substituted contradictions then that may be an indication that the prospect of success is not real. In that regard, I am of the view that the account of the accident as revealed in the Police Traffic Accident Report vis a vis the version of the accident as contained at paragraphs 10-15 of the Defendant's/Applicant's Affidavit dismiss any real prospect of the Defendant/Applicant successfully defending this claim.

[24] The Defendant/Applicant claims that he went to the Police Station to make a report of the accident and while at the police station he met the motorist who collided with him but he never got his name or particulars because he, the motorist asked him not to notify his insurers of the accident because his car papers were not in order. I find it difficult to believe that the Defendant/Applicant would agree to such a request. It defies good sense and logic.

[25] I am of the view that the Defendant/Applicant would have great difficulty in convincing a Court that there was a third driver, based on the police report, his version of the accident, and the fact that he has no name or particulars for this "third person" who he claims hit him from the rear. There is no sufficiently compelling evidence to suggest that there is a real likelihood of the Defendant/Applicant successfully defending the claim. The Defendant/Applicant fails on this ground.

[26] In conclusion, therefore, I think that the Claimant would be severely prejudiced if this application was allowed, he has already received part of the judgment sum, in addition, he would encounter a further delay in procuring a trial date. It would be costly and almost impossible to find witnesses to give an accurate recount of the evidence given the age of the case and most importantly, the cost that would be incurred in dealing with the case justly and ensuring that the parties are on equal footing.

In the case **Evans v Bartlam** [1937] AC 473 at page 650 Lord Atkins suggested that a Court must weigh the use of coercive powers where there is a failure to follow any rule of procedure, against the need for the Court to hear cases on the merits and pronounce judgment.

1. Accordingly the Application filed on January 15, 2016 by the Defendant/Applicant is dismissed.

2. Costs to the Respondent to be agreed or taxed.