[2019] JMSC Civ 249

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015HCV02336

BETWEEN	**ORVILLE CAMPBELL**	**CLAIMANT**
AND	**EVARDO CAMPBELL**	**DEFENDANT**

Ms. Houston Thompson instructed by Dunbar & Company for the Applicant.
Mr. Leslie Campbell instructed by Campbell McDermott for the Respondent/Claimant.

Heard December 11 and 18, 2019.

Civil Procedure – Application by insurance company to set aside order for service by a specified method – Considerations for the Court.

MASTER N. HART-HINES

[1] The matter for the consideration of the Court is an application by Advantage General Insurance Company Limited (hereinafter "the Applicant") to set aside an order for specified service made on October 5, 2016 (hereinafter "the Order"). The Order permitted the Claimant to serve the claim form and particulars of claim on the Applicant, the insurer for a vehicle owned by the Defendant at the time of the accident. The Order also extended the validity of the claim form from April 26, 2016 for six months. The Applicant seeks to have the said Order set aside on the basis that it was not possible to locate the Defendant.

[2] The genesis of the claim is a motor vehicle accident which occurred along the Reading main road in the parish of St. James on December 2, 2012. It is

alleged by the Claimant/Respondent that he was injured when the Defendant so negligently operated a vehicle bearing registration 1804GG that he caused a collision with the Claimant's vehicle bearing registration 9658ED.

BACKGROUND AND CHRONOLOGY

[3] The chronology of the events is relevant to the determination of the application. The chronology is as follows:

i. On October 8, 2012 an insurance policy was obtained from the Applicant by the defendant in respect of his vehicle bearing registration 1804GG.

ii. On December 2, 2012, the motor vehicle accident occurred in St. James.

iii. On October 7, 2013 the said vehicle, owned by the Defendant, was no longer insured by the Applicant.

iv. On April 27, 2015 a claim form and particulars of claim were filed in respect of the motor vehicle accident.

v. On April 29, 2015, the Notice of Proceedings was served on the Applicant.

vi. On June 9, 2015 a Notice of Application for Court Orders was filed to dispense with personal service on the Defendant and to permit the service of claim form and particulars of claim on his insurers. The Application was supported by an Affidavit of Attorney, Mr. Leslie Campbell and an Affidavit of a Process Server, Mr. Lennox Rose, indicating that attempts were made to locate the Defendant on 18th May and 19th May 2015 at 9:10am and 11:30am respectively and these were unsuccessful. Mr. Rose stated that on those dates he went to Catherine Hall, Montego Bay, St. James and made enquiries within the community regarding the whereabouts of the Defendant. It is noted that he did not state precisely that he went to Lot 448 or any neighbouring lot, or identify the persons spoken to or places within the community visited.

vii. On October 5, 2016, the application was heard ex parte and an Order granted to dispense with personal service and to permit the service of the claim form and particulars of claim on the Applicant.

viii. On October 6, 2016, the Formal Order was filed.

ix. On October 20, 2016 the signed Order along with the claim form and particulars of claim were served on the Applicant.

x. On December 29, 2016, a Request for Default Judgment was filed and judgment in default is deemed entered by the Registrar from that date.

xi. On February 13, 2017, a Notice of Application was filed to set aside the Order made on October 5, 2016. An Acknowledgment of Service was filed simultaneously indicating that the Applicant intended to challenge the claim but could not locate the Defendant.

xii. On September 5, 2018 an affidavit was filed in support of the application. This is sworn to by Ruthann Morrison-Anderson. The affiant said that two letters were written to the Defendant, one was posted to his last known address in Jamaica, and one was sent to an address stated on his driver's licence issued in the United States of America. The letter sent to the Jamaican address is dated January 7, 2017, and it was returned by the Post Office. The letter sent to the USA address is not exhibited but is said to be dated May 3, 2018, and that letter was not returned. In addition, Mrs. Anderson stated that she believes that phone calls were made by the Attorneys instructed, to the number on file for the Defendant. Reference is also made by Mrs. Anderson to a Private Investigator being retained shortly after the Order was served on the Applicant.

xiii. An affidavit was sworn to by Mr. Derrick Williams, Private Investigator of ACTAR Investigations on December 28, 2018, but filed on February 18, 2019. Therein Mr. Williams stated that he was retained by the Applicant in December 2016 to try to locate the Defendant. He further stated that he visited Lot 448 Catherine Hall in January 2017 and did not find the Defendant, and was informed that he removed from that address three (3) years before.

xiv. On December 1, 2018 the claim became statute barred.

THE SUBMISSIONS

[4] Ms. Houston Thompson submitted that the court should be careful not to place

an onerous burden on the insurance company to locate the Defendant. Instead, what is required is that the Applicant demonstrate that it had taken reasonable steps to do so. Counsel submitted that the Applicant took sufficiently reasonable steps to locate and contact the Defendant but was not able to do so. Reliance was placed on the affidavit of the private investigator as well as the fact that letters were sent and one was returned. Counsel relied on the case of ***Keisha Bennett and others v Brian Stephens and others*** [2017] JMSC Civ. 177.

[5] Mr. Leslie Campbell submitted on behalf of the Respondent that the Applicant has not made sufficient effort to locate the Defendant and to bring the claim form and particulars of claim to his attention. Counsel submitted that the Applicant could have attempted to locate the Defendant from April 29, 2015, when the Notice of Proceedings was served on it. Counsel further submitted that the Applicant did not ascertain where the Defendant worked and did not check social media, or the voter's list, or go to the police station and post office in an effort to track down the defendant. Counsel relied on the decision in ***Jephtah Davis v Roy Marshall*** [2017] JMSC Civ 161 for guidance on the nature of some reasonable steps which the insurance company should take to locate the Defendant.

[6] Mr. Campbell posited that a determination of the application in favour of the Applicant, would result in a final order being made, as the cause of action was now statute barred. Mr. Campbell submitted that injustice would be done to the Claimant as a result. Counsel further submitted that as the Applicant had filed an Acknowledgment of Service indicating that it intended to defend the claim, it may do so by virtue of the Applicant's right of subrogation. Further, Mr. Campbell submitted that the law places a continuing obligation on the insurance company to satisfy a judgment up to the policy limit, even after the contractual relationship with the insured ceased.

THE ISSUES

[7] The following issues have been identified for consideration:

(1) Should the application be heard if filed late?

(2) Was the claim form likely to come to the Defendant's attention through the Applicant?

(3) Has the Applicant taken all reasonable efforts to locate the Defendant?

(4) Can the Court be satisfied that the Defendant was served with the claim form?

THE LAW AND ANALYSIS

[8] I have considered the case law cited by counsel for the parties. I will briefly summarise the law relevant to this application as I consider the issues.

Should the application be heard if filed late?

[9] Rule 11.16(2) of the Civil Procedure Rules (hereinafter "CPR") indicates the timeframe within which an application should be brought to set aside or vary an Order made on an application without notice. Rule 11.16(2) provides:

> *"(2) A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent."*

[10] Rule 26(2)(c) of the CPR permits the Court to extend the time for compliance with any rule. In deciding whether or not to permit the application to be heard, I am guided by the overriding objective of the CPR. I am also guided by the principles set out in ***Leymon Strachan v The Gleaner Company Limited and Stokes*** Court of Appeal, Jamaica, Supreme Court Motion No 12/1999, judgment delivered 6 December 1999. In that case, Panton JA (as he then was) stated at page 20 that in exercising its discretion to extend time generally, the Court should consider factors such as (1) the length of the delay in filing the application supported by affidavit evidence, (2) the explanation for the delay, or lack thereof, and (3) the possible prejudice occasioned by the delay. Further, Panton JA said:

> *"(4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time,* ***as the overriding principle is that justice has to be done****." (My emphasis)*

[11] Rules 1.1(1) and 1.1(2)(d) and 26(2)(c) of the CPR provide:

> *"**1.1(1)** These Rules are a new procedural code with the overriding objective of enabling the Court to deal with cases justly.*
> *(2) Dealing justly with a case includes -*
> *(d) ensuring that it is dealt with expeditiously and fairly; …"*

> *"**26… (2)** Except where these Rules provide otherwise, the Court may -*
> *(c) extend or shorten the time for compliance with any rule, practice direction, order or direction of the Court even if the application for an extension is made after the time for compliance has passed"*

[12] I consider it appropriate and just to extend the time within which to make this application and allow it to be heard. In the instant case it is clear that the Applicant acted reasonably swiftly in filing its Application to set aside the Order made on October 5, 2016. This was done within four (4) months of the date of receipt of the perfected Formal Order and the claim form and particulars of claim on October 20, 2016. As at February 13, 2017 (when the Application was filed), it was apparent to the Applicant that the Defendant could not be located. The Applicant's Attorneys notified the Attorneys for the Claimant/Respondent of this by letter dated February 11, 2017. The said letter, which was received on February 16, 2017, indicated that an Application would be filed to set aside the order, and that the documents in support of the application would be served once a hearing date was fixed. The hearing date was not fixed until December 3, 2019. However, it is not clear when the Application and affidavit in support were served.

Was the claim form likely to come to the Defendant's attention?

[13] It is settled law that service on the Defendant's insurer should only be permitted in circumstances where it is likely that the Defendant will be able to ascertain the contents of the claim form. In ***Insurance Company of the West Indies Ltd. v Shelton Allen (Administrator of the estate of Harland Allen) et al*** [2011] JMCA Civ. 33 (hereinafter "***Shelton Allen***"), Morrison JA (as he then was) considered Rules 5.13 and 5.14 of the CPR and cited dictum of Lord Reading CJ in ***Porter v Freudenberg; Krelinger v Samuel and Rosenfield; Re Merten's Patent***: [1915] 1 KB 857. At pages 887-888 Lord Reading CJ said thus:

> *"[a Defendant] is, according to the fundamental principles of English law, entitled to effective notice of the proceedings against him.… In order that substituted service may be permitted,* ***it must be clearly shown that the plaintiff is in fact unable to effect personal service and that the writ is likely to reach the Defendant or to come to his knowledge*** *if the method of substituted service which is asked for by the plaintiff is adopted." (My emphasis)*

[14] The premise of the Claimant's application in 2015 was that the Applicant was

in a position to locate the Defendant and bring the claim form and particulars of claim to his attention because the Applicant was the insurer for the Defendant's vehicle at the time of the accident in 2012. I am not of the opinion that should be the sole consideration. Dictum in ***Nico Richards v Roy Spencer (Jamaica International Insurance Co Ltd - Intervening)*** [2016] JMCA Civ 61 (at paragraph 33) suggests that a court hearing such an application should be mindful of the amount of time that has elapsed between the date of the accident and the date of the hearing. With the passage of time, the contractual relationship between the Defendant and the insurer might have ceased, and the insurer might have no knowledge of the whereabouts of the Defendant. Further, dictum in ***Shelton Allen*** (at paragraphs 10 and 11) reiterates that a duty is imposed on an applicant making an ex parte application to make full and frank disclosure of all the material facts within his knowledge. Consequently, the application for an order for service by a specified method ought to disclose matters such as the fact that the Defendant had a driver's licence issued by another country, or that the policy was said to have been breached.

[15] In the instant case, when the claim form was filed, two years and four months had passed since the date of the accident. A further six months elapsed as at the date of the hearing. Having regard to the length of time that elapsed, in my opinion, there was a real possibility that the claim form might not come to the Defendant's attention through his insurers. At the date of the hearing, there was no evidence that a relationship between the insurance company and the Defendant still existed. It has now been revealed that the policy was not renewed after October 7, 2013, which is ten months after the accident, and one year and six months before the claim form was filed. I have also observed that there was nothing in the affidavit evidence filed in respect of the Claimant's application to suggest that the Defendant was the holder of a USA issued driver's licence. This information might have assisted the Master in making her decision at the time.

[16] By way of observation, it would have been more prudent for the Attorneys for the Claimant to file and serve the Application for service by a specified method

on the Applicant insurance company, informing the Applicant of the date and time of the hearing. I am of the opinion that such Applications should be *inter partes,* with sufficient notice of the hearing being afforded to an insurer to allow the insurer to attempt to locate a Defendant, and to attend the hearing. Had this been done shortly after the claim form was filed in 2015, instead of filing an *ex parte* application, it might have become apparent to both the Applicant and the Attorneys for the Claimant that the Defendant might not have been ordinarily resident in Jamaica, and that the relationship between the Applicant insurance company and the Defendant did not subsist. It would then have been open to the Attorneys for the Claimant to seek an alternative method of service or attempt to locate and serve the Defendant outside of Jamaica.

[17] The filing of multiple applications regarding service of the claim form is both expensive and time consuming, and this is contrary to the overriding objective of the CPR. The CPR was expected to herald the beginning of a speedier dispensation of justice. This means that a multiplicity of proceedings, unnecessary satellite litigation and delays in litigation are to be avoided, and an inter partes application would avoid this.

Has the Applicant taken all reasonable efforts to locate the 2nd Defendant?

[18] In considering whether the Applicant has demonstrated that it made reasonable efforts to locate the Defendant, I am guided by the decision in ***British Caribbean Insurance Company Limited v David Barrett and Others*** [2014] JMCA App 5. There, Brooks JA considered the efforts made by the Applicant insurance company to locate a Defendant (Ivor Ruddock) with whom an insurance contract had existed, and to locate the driver of the vehicle (Jason Evans). There, the Applicant relied on the fact that it had sent letters and made telephone calls. However, the Court of Appeal upheld the decision of the Master in Chambers in refusing to exercise her discretion to set aside the substituted service order, since there was no evidence that attempts were made to personally deliver any letter to Mr. Ruddock's home or work address and no letters were posted to his home address.

[19] In the instant case, the Applicant acted reasonably swiftly in attempting to

locate the Defendant in Jamaica, after it was served with the Order in October 2016. By January 2017, the Private Investigator visited the address on file for the Defendant, at Catherine Hall, St. James. In addition, letters were sent and phone calls made. These attempts to contact the Defendant in Jamaica were unsuccessful. In May 2018, an attempt was made to locate the Defendant in the United States of America, as a letter was posted to an address there. No response was received from the Defendant.

[20] I am satisfied based on all the affidavit evidence that the Applicant was unable to locate or contact the Defendant and has no knowledge of his current address. I am also satisfied that the Applicant did all that could reasonably be done to try to locate the Defendant.

[21] I have considered Mr. Campbell's submission that the Applicant should have commenced searching for its insured from the date of receipt of the Notice of Proceedings on April 29, 2015. Having regard to the affidavit evidence of Mr. Derrick Williams, that his investigations revealed that the defendant removed from the address three years before January 2017, I am not satisfied that a visit to the address in April 2015 would have yielded a different result. Further, it would seem pointless for further checks to be made at the post office and at the police station nearest to the area of Catherine Hall. As regards attempting to ascertain the place of work of the Defendant, this does seem like a reasonable enquiry which could have been made. However, when consideration is given to the fact that the Defendant had a USA drivers' licence rather than a Jamaican one, it seems to me that there was a possibility that any checks in relation to the Defendant's work might also have proved futile, if the Defendant had left the jurisdiction.

[22] The Applicant acted with some alacrity in attempting to locate its insured and in filing its application to set aside the Order for specified service. I have noted however that there was a delay in filing the affidavits in support of the application. However, Rule 11.16 of the CPR does not appear to require that such an application be supported by affidavit evidence. The application could therefore have been listed for hearing any time after the date of its filing on

February 13, 2017, although affidavit evidence indicating the efforts made to locate the Defendant would have been desirable. Mrs. Anderson's affidavit was filed three (3) months before the claim became statute barred on December 1, 2018. I am not of the view that the delay by the Applicant in filing an affidavit in support of its application has prejudiced the Claimant/Respondent because it is apparent that the Defendant could not be located or contacted in Jamaica in any event.

[23] The delay in the fixing of the application for hearing must be attributable to the Court Registry. However, it is my opinion that both parties could have sought to have the application heard earlier. Rule 1.3 of the CPR provides that the parties have a duty to help the Court to further the overriding objective of enabling the court to deal with cases justly and expeditiously. On February 16, 2017, the Claimant's Attorneys received notification by letter that an application would be filed to set aside the Order. As the Claimant's Attorneys knew when the claim would become statute barred, it was open to them to write to the Registrar and to seek to have the application fixed for hearing between February 2017 and December 2018, before the expiration of the limitation period. Even if the application was successful, providing that it was heard before December 1, 2018, the Claimant would still have had time to file a fresh claim, if desired. The Claimant's Attorneys must always be mindful that any delay in filing or serving the claim form on a defendant, might inure to the benefit of that defendant. It is therefore the duty of Claimant's Attorneys to prosecute the claim, and in my opinion, this includes liaising with the Court directly or with the Applicant to ensure that the application was fixed for hearing before the claim became statute barred.

What is the purpose of service?

[24] It is important to note the purpose of service of the claim form. In ***Hoddinott v Persimmon Homes (Wessex) Ltd*** [2008] 1 WLR 806, it was said at page 821 at paragraph 54:

> *"…service of the claim form serves three purposes. The **first** is to notify the defendant that the claimant has embarked on a formal process of litigation and to inform him of the nature of the claim. The **second** is to enable the defendant to participate in the process and have some say in the way in which the claim is prosecuted: **until he has***

> ***been served, the defendant may know that proceedings are likely to be issued, but he does not know for certain and he can do nothing to move things along***. *The* ***third*** *is to enable the court to control the litigation process. If extensions of time for serving pleadings or taking other steps are justified, they will be granted by the court. But until the claim form is served, the court has no part to play in the proceedings…" (My emphasis)*

[25] Having regard to the fact that a defendant is entitled to have notice of the proceedings against him, I must be satisfied that service of the claim form and particulars of claim on the Applicant insurer resulted in the Defendant becoming aware of the claim and contents of the documents.

Can the Court be satisfied that the Defendant was served with the claim form?

[26] The Defendant was not found at his last known address in Jamaica by either the Claimant's Process Server (who visited the address in May 2015), or by the Applicant's Private Investigator (who visited the address in January 2017). The Affidavit of the Private Investigator indicates that he received information that the Defendant has not resided at that address for approximately three years prior to January 2017. No other address in Jamaica has been identified as an address at which service might be effected. Further, there is no evidence before the Court that the Defendant is currently residing at the USA address to which the Applicant's letter dated May 3, 2018 was sent.

[27] There is no evidence before the Court that the Defendant is aware of the proceedings filed against him. As the Court is not satisfied that the Defendant is aware of the proceedings against him, it is in the interests of justice that the Order made on October 5, 2016 and the default judgment be set aside.

ORDERS

[28] In light of the foregoing, I now make the following orders:

1. The time within which to make the application is extended.
2. The application to set aside the Order for specified service, made on October 5, 2016, is granted.
3. The Default Judgment entered on December 29, 2016 is set aside.
4. No order as costs.
5. Leave to appeal granted.