[2024] JMCC COMM. 09

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD00484

BETWEEN	**CARREN LIMITED**	**CLAIMANT**
AND	**QUEST SECURITY SERVICES LIMITED**	**DEFENDANT**

Mr. Jeffrey Daley instructed by Betton-Small, Daley & Co. Attorneys-at-law for the Claimant

Ms. Kaysian Kennedy Sherman instructed by Townsend, Whyte & Porter Attorneys-at-law for the Defendant

IN CHAMBERS

Heard: 9th January and 9th and 28th February, 2024

Rules 5.7, 5.19, 8.16, 12.4, 13.2, 26.9, 42.6, 45.2, 46.4 and 47.2 of the Civil Procedure Rules, 2002 – Section 387 of the Companies Act- Whether Default Judgment was irregularly obtained - Whether the Claimant's Order for Seizure & Sale can be set aside after execution

STEPHANE JACKSON-HAISLEY J.

BACKGROUND

[1] This matter concerns an application to set aside a Default Judgment and an application for a "stay of proceedings" of an Order for Seizure and Sale until the hearing of the application to set aside the Default Judgment. The Applicant/Defendant, Quest Security Services Limited alleges that the Claim Form

and Particulars of Claim filed on November 26, 2020 were never served on them and that nothing was received by the Defendant by registered post or otherwise and that the first time they are learning of this Claim was when an officer of the Court attended upon their office to execute the Order for Seizure and Sale. The Applicant also asserts that it has a real prospect of succeeding in its Defence and has exhibited a Draft Defence setting out the nature of its Defence. The Applicant asks the Court to find that the Default Judgment dated February 2, 2023 was wrongly entered.

[2] The Claimant/Respondent Carren Limited contends that the Defendant was properly served by registered post as provided for by section 387 of the Companies Act and that they have put forward incontrovertible evidence of service by registered mail. They assert that there has been partial execution as the Bailiff executed the Order for Seizure and Sale by levying on the assets of the Defendant's company and seizing a Ford motor car. As a consequence, they contend that the application for a stay of execution of the Order for Seizure & Sale cannot be granted. It is further argued that there is no application before the Court seeking to set aside the Order for Seizure and Sale as provided for by rule 42 of the Civil Procedure Rules (CPR) and that the Defendant's application cannot reverse the execution of the Order for Seizure and Sale.

EVIDENCE ON BEHALF OF THE DEFENDANT/APPLICANT

[3] The evidence on behalf of the Applicant was presented by Mrs. Rachel Dibbs, a Director of the Defendant as well as Ms. Louise Brown, the Defendant's Company Secretary. In her affidavit filed June 28, 2023, Mrs. Dibbs averred that on June 28, 2023, an officer of the Court attended the Defendant's address at 26 Roosevelt Avenue, Kingston 6 to execute seizure of the Defendant's assets. Mrs. Dibbs stated that no other documents were served at the Defendant's registered address neither were any registered slips received by the Defendant, therefore, it had no notice of the claim. She further pointed out that in the affidavit of Marlene Powell

who deponed on behalf of the Claimant, it was averred that the Claimant served the Defendant by registered post at 6 Roosevelt Avenue, Kingston 6 which is not the registered address of the Defendant.

[4] In defence of the claim, Mrs. Dibbs asserted that the Claimant deceptively provided unfit vehicles which were unable to be driven and that the Defendant has a good counterclaim as it had to obtain working vehicles for the period that the Claimant's vehicles were defective. She stated that as soon as the documents came to the Defendant's attention, steps were taken to locate the documents and make efforts to defend the claim. She was subject to cross-examination where she agreed that the registered address is 26 Roosevelt Avenue, Kingston 6, however, she stated she was unsure whether that address may be used interchangeably with 26 Herb Mckenley Drive. Mrs. Dibbs further admitted that no one could enter onto the premises as the gate is manned by security guards.

[5] In her affidavit filed October 24, 2023, Ms. Brown averred that at all material times, she, as well as other managers were always present on the Defendant's compound and at no time were the pleadings brought to her attention. Ms. Brown indicated that the demand letter was served and signed for by her personally, however, to her knowledge, notice of the claim was only brought to the Defendant's attention on June 28, 2023. Ms. Brown further stated that as soon as the claim was brought to the Defendant's attention, steps were taken to locate the supporting documents and defend the claim. She was also subject to cross-examination and expressed that at the material time she had responsibility to receive registered mail and slips on behalf of the company. She also admitted that no one could be allowed on the premises without permission from the security guard who in turn would get permission from a director or manager. She agreed that the registered address at 26 Roosevelt Avenue may be used interchangeably with 26 Herb McKenley Drive, however she could not recall receiving any mails addressed to 26 Herb McKenley Drive.

EVIDENCE ON BEHALF OF THE CLAIMANT

[6] Mr. Wilton Hayman in his Affidavit in opposition to the Application to Set Aside Default Judgment filed November 28, 2023 deponed that after making several efforts to effect personal service on the directors of the company, an application was made before the Court for alternate method of service which was refused as the Court was of the view that service could be effected by registered mail. Mr. Hayman asserted that the Default Judgment was obtained after the Defendant failed to acknowledge service of the Claim Form or filed a Defence. He further stated that an Order for Seizure and Sale was obtained on June 15, 2023 and the Bailiff for the Corporate Area executed the Order for Seizure and Sale by seizing a Ford Motor car from the Defendant's premises.

[7] Mr. Hayman asserted that the Defendant does not have a good defence as sufficient evidence has not been provided by the Defendant that the vehicles were alleged to be inoperable. He further asserts that for the contract period ranging between December 2018 and January 2020, only two emails dated September 12, 2019 and February 18, 2019 raising complaints about substandard or barely functional vehicles were provided.

DEFENDANT'S/APPLICANT'S SUBMISSIONS

[8] Counsel for the Defendant relied on CPR Part 5 as well as **Great Northern Rly Co. v Great Central Rly Co.** (1899) 10 Ry & Can Tr 266 at 275 for the definition of the meaning of service on an individual as opposed to service on a company. Counsel submitted that the Claimant narrowed the available methods of service permitted by the CPR as it could have utilized any method of service allowed by the CPR.

[9] Counsel thereafter submitted that the Claimant has not provided evidence in proof of service on the Defendant as required by law. She asserted that proof of service

means proof that the registered articles had not only been posted as required by law but also that it had not returned. It was contended that it is only then could it have been deemed to be effected or delivered. To support this position, Counsel relied on **Shirley Beecham v Fontana Montego Bay Limited** [2014] JMSC Civ. 119, **Ann Thomas v Guardsman Limited** [2018] JMSC Civ 42 as well as **Annette Giscombe et al v Howe and Anor** [2021] JMCA Civ 47.

[10] It was further submitted that the Defendant has a real prospect of success as the terms of the contract between the parties detailed that the Claimant had a duty to provide road worthy vehicles and so would be in breach of contract where they provided vehicles which were not working.

CLAIMANT'S/RESPONDENT'S SUBMISSIONS

[11] Counsel on behalf of the Claimant indicated that the issue which arises before the Court is whether the Defendant's application for stay of execution can succeed in a case where the Bailiff has already executed the Order for Seizure and Sale. Counsel submitted that the Defendant's application is silent on the fact that the Order for Seizure and Sale has already been executed and that the Defendant's application as framed cannot reverse the execution of the Order for Seizure and Sale. It was contended that the issue of whether or not the Defendant can demonstrate that it has a good defence to the claim is not a factor for consideration in setting aside the Order for Seizure and Sale and relied on **Marilyn Hamilton v United General Insurance Company** [2019] JMCC Comm 19 where Simmons J. (as she then was) at paragraph 42 opined that:

> ***"[42] Where an execution is irregular due to non-compliance with the CPR the Order for Seizure & Sale can be set aside. Non-compliance does not nullify the proceedings or any step taken, or made unless ordered by the Court Rule 26.9 of the CPR states:***

(a) This rule applies only where the consequences of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.

(b) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any steps taken in the proceedings unless the court so orders.

(c) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right."

[12] It was submitted that the Defendant has not demonstrated that service on it by registered mail was irregular therefore the Default Judgment and the Order for Seizure and Sale were issued by the Registrar correctly and its execution ought not to be reversed.

[13] Counsel also relied on Section 387 of the Companies Act which provides for service of registered mail on a company and submitted that the Defendant failed to provide independent evidence that the registered mail was never signed for by the Post Office or that it was returned unclaimed. In support of this submission, Counsel relied on **Merline Leslie v Top Seal Company Ltd. [**2022] JMSC Civ 10 and submitted that unless the Defendant demonstrates a flaw or irregularity in the method of service of the legal process by registered mail, the service ought properly to stand.

ISSUES

[14] The issues that arise are:

1. Whether the Default Judgment should be set aside?
2. Whether the Order for Seizure and Sale date can be reversed?

DISCUSSION

Whether the Default Judgment should be set aside?

[15] Rule 13 of the CPR sets out the procedure for setting aside or varying a Default Judgment. According to Rule 13.2, the Court must set aside the judgment if it was wrongly entered because:

a. In the case of a failure to file an acknowledgment of service, any of the conditions in rule 12.4 was not satisfied;

b. In the case of judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied; or

c. The whole of the claim was satisfied before judgment was entered.

[16] It is the Defendant's argument that they were never served and that proof of posting is not proof of service as there should be proof that the registered articles had not only been posted but that it had not been returned and only then could it have been deemed to be effected or delivered. Section 387 of the Companies Act makes provision for service on a company to be made by registered post and this is further supported by Rule 5.7 of the CPR which provides that the method of service of Claim Form on a limited liability company may be effected by:

(a) By sending the claim form by telex, Fax, prepaid registered post, courier delivery or cable addressed to the registered office of the company;

(b) By leaving the claim form at the registered office of the company;

(c) By serving the claim form personally on any director, officer, receiver, receiver manager or liquidator of the company;

(d) By serving the claim form personally on an officer or manager of the company at any place of business of the company which has a real connection with the claim;

(e) In any other way allowed by an enactment.

[17] The Claimant has exhibited as proof, the registered slip evidencing service by registered mail. The Claimant had elected this method of service after efforts to personally serve a director or manager of the Defendant company had failed and after forming the view that the Defendant had been evading service. The Claimant then caused the sealed copy of the Claim Form dated November 26, 2020 with Notice to the Defendant, prescribed Notes to the Defendant Acknowledgment of Service of Claim Form and Form of Defence together with the Particulars of Claim dated November 26, 2020 to be served by registered post to Quest Security at 26 Herb McKenley Drive, Kingston 6 in the parish of Saint Andrew.

[18] The documents served did not include a Notice to Pay by Instalments. It was argued on behalf of the Defendants that service is irregular for failure to serve this document however it was pointed out by the Claimant that the Notice to Pay by Instalment is only required to be served where the Defendant is an individual pursuant to the Rule 8.16 (1)(e) of the CPR. There was an attempt on behalf of the Defendant to argue that an 'individual' and a 'person' should have the same meaning and so since a company is recognised in law as a person it should also be served with this document.

[19] Rule 8.16 (1)(e) provides that when a claim form is served on a defendant, one of the documents that must accompany the claim form, "if the claim is for money and the defendant is an individual, a form of application to pay by instalments (form 6)". I did not find favour with the Defendant's submission that the company is to be treated as an individual. I formed the view that the reference in the Rules to individual excludes a company and so there was no requirement to serve the Defendant with the Application to Pay by Instalments.

[20] The Affidavit of Service by registered post sworn to by Marlene Powell on August 19, 2021 exhibits the Certificate of posting of registered article numbered 9453 dated July 29, 2021 in proof of posting, however, Ms Powell's Supplemental Affidavit of Service also sworn on January 31, 2023 states that the letter was

addressed to Quest Security Services Limited at 6 Herb McKenley Drive, Kingston 6. Even thought Ms Powell incorrectly states that the documents were served at number 6 the registered slip has the number 26 endorsed on it. This is what is relevant for these proceedings.

[21] The Defendant asserts that the registered slip was never received from the Post Office and that the letter was not sent to the Defendant's registered address which is 26 Roosevelt Avenue, Kingston 6. I have taken note of the evidence presented and I note that throughout the evidence, the Claimant stated that the Defendant's registered address is 26 Herb McKenley Drive, Kingston 6. The Defendant on the other hand states that registered address is 26 Roosevelt Avenue, Kingston 6. It has not been denied that both addresses are one and the same place. Based on the evidence presented by the Claimant regarding service there is a presumption that the Defendant was served by registered mail at its registered office.

[22] Rule 5.19(1) provides that a claim form that has been served within the jurisdiction by pre-paid registered post is deemed to be served, unless the contrary is shown, on the day shown in the table in rule 6.6. Pursuant to Rule 6.6, the deemed date for service of registered post is 21 days after the date indicated on the Post Office receipt. In **Linton Watson v Gilon Sewell & Anor** [2013] JMCA Civ 10, Phillips JA (as she then was) at paragraph 36 stated that:

> "*The words in rule 5.19 "unless the contrary is shown", do suggest that the server or the recipient can attempt to show to the court, once in conformity with the rules, when actual receipt of the documents occurred. In respect of the claimant, evidence can be produced to show that the claim form was in fact sent earlier than the date on which service was deemed to have been effected, thereby dispelling the fiction of deemed service on any other day, and in my view, in respect of the instant case, that service may not have been effected at all. The presumption of the deemed date of service is therefore in my opinion, in relation to this rule, rebuttable .... This evidence may be adduced on behalf of either the claimant or the defendant to show that the service of the claim form did not take place on the deemed day of service set out in rule 6.6 or at all."*

[23] In **Ann Thomas v Guardsman Limited & Anor** [2018] JMSC Civ. 42, Wint-Blair J at paragraph 17 said:

> *[17] "At common law, the defendant plainly received notice of the proceedings when he was taken into the custody by the sheriff as required by the writ. The CPR has preserved the common law position in that it is still a requirement that the defendant receive notice. As the presentation of the body of the defendant was proof that he had been given notice of the proceedings against him, so is the affidavit of service proof that the defendant received notice of the proceedings against him. It does not to my mind mean that an affidavit of posting is or should be construed as other than proof of posting."*

[24] Wint-Blair J also found at paragraph 20 that:

> *"[20] The argument made by Mr. Samuels that the documents had come to the respondent's attention by the delivery of the registered slip starts from the proposition that proof of posting is all that is required. In my view, it was not the registered documents which had been delivered but merely a notice that there were registered articles in the possession of the Postmaster. It would have been impossible for the respondent to say that which had been posted as the Certificate of Posting of a Registered articles exhibited to the affidavit of posting does not describe the article received by the Postmaster and in fact is simply a receipt to the bearer that an article has been received by the Postmaster who will in turn alert the addressee to its existence. The documents would not have come to the respondent's attention until they had been delivered.*

[25] Based on these cases, not only would it be presumed that the Defendant was in fact served but the Defendant would have been deemed to be served 21 days after the date of posting. However, it is also clear that the deeming provisions as well the presumption in favour of service can be displaced if there is evidence which proves otherwise.

[26] In order to counter the allegation of service of the Claim the Defendant relies on the Affidavits of Rachel Dibbs and of Louise Brown. According to Ms Brown, company secretary of the Defendant, these documents were never brought to the attention of the Defendant by registered post or otherwise. She indicated that she

received registered slips and sends for post when received but that she has never received any registered post from the Claimant nor any Claim or Particulars of Claim and that no notice of the Claim ever came to the attention of the Defendant. In cross-examination Ms. Brown admitted that the address for 26 Roosevelt Avenue would be used interchangeably with 26 Herb McKenley Drive, however mails for the Defendant company would generally have 26 Roosevelt Avenue and she has no recollection of seeing any mails addressed to 26 Herb McKenley Drive.

[27] The Defendant also placed reliance on the Supplemental Affidavit of Louise Brown filed January 17, 2024 which exhibits the letter from the Postmaster General dated January 4, 2024 which reads as follows:

> *"The Manager*
> *Quest Security Services Limited*
> *26 Roosevelt Avenue*
> *Kingston 6*
>
> *Dear Sirs,*
>
> ***Re: Registered post slip 9543 dated 29 July 2021***
>
> *Reference is made to your letter of November 29, 2023 regarding the subject at captioned.*
>
> *Please be advised that checks have revealed that the registered item was not collected by the addressee. Consequently, the item was returned to the Liguanea Post Office on September 20, 2021, to the sender at the Cross Roads Post Office and a notice sent to the sender to retrieve the item.*
>
> *The sender however did not retrieve the item, resulting in it being forwarded to the Return Letter Branch at CSO by the Cross Roads Post Office on October 25, 2021.*
>
> *I hope this brings clarity to the matter.*
>
> *Yours sincerely"*

[28] The case of **Shirley Beecham v Fontana Montego Bay Limited** relied on by the Defendant makes the point that service by registered post is a presumption of service which can be displaced. It can be displaced where there is evidence to the

contrary. The letter from the Postmaster General supports the Defendant's contention that the documents never came to their attention. The letter goes further to indicate that not only was it not collected by the addressee but that it was returned to the post office from which it came. There is therefore evidence on behalf of the Defendant which satisfies me on a balance of probabilities that the Claim Form and Particulars of Claim did not come to the attention of the Defendant. This evidence displaces the presumption of service on the Defendant and so I find that they were not properly served.

[29] CPR 13.2 provides that the Court **must** (emphasis mine) set aside a judgment entered under Part 12 if judgment was wrongly entered in the case of a failure to file an acknowledgement of service or any of the conditions in rule 12.4 was not satisfied. In this case judgment in default was entered for failure to file an Acknowledgement of Service. Having found that there was lack of service, the Default Judgment was irregularly obtained and so it must be set aside.

Whether the Order for Seizure and Sale dated can be reversed?

[30] The Claimant's submission is that the Order for Seizure and Sale cannot be reversed as it has already been executed, if not fully at least partially and that the proper application should have been made pursuant to Rule 47.2 to vary or suspend the Order for Seizure & Sale. It was also argued that the Defendant has failed to disclose that there had been partial execution of the Writ of seizure and sale and that this is a material non-disclosure. It is true that the Defendant had not indicated this in any affidavit that its vehicle was seized. This is a fact that would be relevant however to say it is a material non-disclosure may be taking it a step too far. This is not one of those cases that hinges on full and frank disclosure and so it does not affect the ability of the Court to consider the application. In any event I am of the view that whether the writ was partially or fully executed the principles the court would have to consider would be the same.

[31] The issue as to whether an Order for Seizure and Sale can be set aside after its execution was addressed in the case **Marilyn Hamilton v United General Insurance Company** at first instance wherein Simmons J (as she then was) considered whether the Order for Seizure and Sale had been issued prematurely. She found that the Registrar erred in that she issued the Order for Seizure and Sale prematurely and as a consequence it was irregular due to non-compliance with the CPR. It was on that basis that the Court found that the Order for Seizure and Sale can be set aside.

[32] This is a distinctively different position from the instant case as there is no allegation here that the Order for Seizure and Sale was issued in error. In these circumstances the order was issued based on the presentation to the Court of a Judgment in Default. It is however the Defendant's argument that this order can be set aside on the basis that the Defendant has not been served. The decision of Simmons J is demonstrative of the position that an Order for Seizure and Sale is not absolute and that the Court is entitled to look behind it and consider the circumstances under which it was issued.

[33] It is the Claimant's contention that the Defendant has not made any application to the Court under CPR 47.2 and so the Court cannot suspend or vary the order for seizure and sale. CPR 47.2 makes provisions for an application to vary time and method of payment or suspend order for seizure and sale. Rule 47.2(2) provides as follows:

> *"An application by the judgment debtor to vary the terms of the judgment as to the time or method of payment or to suspend a writ or execution under this rule must be supported by evidence on affidavit:"*

[34] In the Defendant's Application there is no request to the Court to vary or suspend the Order. Instead, the Defendant applied for a stay of proceedings of the order for seizure and sale until the hearing of the Defendant's application to set aside

Default Judgment or until such further time as the Court deems fit. In doing so, I am of the view that although the words "vary" or "suspend" were not used in accordance with the provisions of CPR 47.2, essentially the Defendant is seeking the same very thing that is a suspension of the order. The Application was accompanied by affidavit evidence and was served on the Claimant as required by the Rules. The Court is therefore empowered to consider whether in these circumstances the Defendant is entitled to have the order for seizure and sale suspended or set aside. Simmons J (as she then was) in the **Marilyn Hamilton** case made this clear when she said at paragraph 42 of the judgment:

> *Where an execution is irregular due to non-compliance with the CPR the order for seizure and sale can be set aside. Non-compliance does not nullify the proceedings or any step taken or order made unless ordered by the Court.*

[35] The decision of Simmons J (as she then was) was upheld on appeal. Phillips JA made the following pronouncement at paragraph 47 of the judgment:

> *It is important to state that the authorities make it clear that if the execution process has proceeded on a flawed basis because it ceases to have effect. Once the basis for the enforcement fails away the enforcement becomes irregular and the general rule is that it must be set aside (see Halsbury's Laws of England, Volume 17 (1), Fourth Edition, at paragraph 215). Accordingly, on the making of the order by Simmons J to set aside the order for seizure and sale, it having been premature, the enforcement becomes irregular and must be set aside. What follows from this is that the order requiring payment of $1,600,000.00 on condition of the grant of the execution to secure payment of the costs, the basis of the order must also be set aside and the monies paid into court by AGI must be returned to them, and I would so order.*

[36] I am therefore of the view that if the basis of the Default Judgment was incorrect in that there had been no proper service it would mean that the judgment was irregularly obtained, and the Defendant would be in a similar position to the Defendant in the **Marilyn Hamilton** case and would be entitled to have the Order

for Seizure and Sale set aside. This is based on the clear provisions of CPR 26.9 which I have set out below:

> *"(1) This rule applies only where the consequences of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.*
>
> *(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings unless the court so orders.*
>
> *(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.*
>
> *(4) …."*

[37] The court can set aside the Order even without any application from the Defendant if the Court deems it a proper case to do so. The position would be different if the judgment were regularly obtained. In other words, if the Defendant were only seeking to reverse the Order or set it aside on the basis only that he has a good Defence this would not avail him as in that case the judgment would have been regularly obtained.

[38] Although it is not necessary for these purposes to consider whether the Defendant has a real prospect of successfully defending the Claim, out of completeness I will say a few words on it. The Claimant's case is that the Defendant has defaulted in making payments pursuant to a Motor Vehicle Rental Agreement and that despite numerous demands the Defendant has failed to make payments amounting to the tune of Five Million Eight Hundred ad Sixty-Six Thousand Seven Hundred and Fifty Three Dollars and Twelve Cents ($5,866,753.12) In the Draft Defence it is asserted that the Claimant was paid for working vehicles provided and that the agreement was to pay for working vehicles which did not continually break down and were non-functional. The Defendant avers that it only refused to pay for vehicles that were non-functional or barely functional.

[39] Based on the Defence, the Defendant would have had a real prospect of successfully defending the Claim. They would also have been able to show that they applied to the Court as soon as reasonably practicable after finding out about the judgment in default. Although this would have aided in the Court's decision to set aside the default judgment however this alone would not have been sufficient basis to set aside the Order for Seizure and Sale as in this case the Default Judgment would have been regularly obtained.

[40] Having found that the Default Judgment was irregularly obtained, the Court would be empowered to set aside the Order for Writ of Seizure and Sale. With respect to costs, although the successful party is normally entitled to costs, under these circumstances I am minded to order otherwise as the Claimant had always proceeded on the basis of what they thought was proper service and so should not be penalized by an order for cost. My Orders are as follows:

1. The Default Judgment dated 2nd February 2023 and entered in Binder 779 Folio 126 is set aside;
2. That the Order for Seizure and Sale filed on 5th June 2023 is set aside;
3. The Ford Motor car seized in pursuance of the Order for Seizure and Sale is ordered returned; and
4. No order as to costs.

……..
Stephane Jackson Haisley
Puisne Judge