[2015] JMSC CIVIL 19

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO.2011HCV05718

BETWEEN	**First Global Bank Limited**	**CLAIMANT**
AND	**Garfield Dussard**	**DEFENDANT**

Danielle Chai for the Claimant instructed by Samuda & Johnson

Phillip Bernard for the Defendant/Applicant instructed by Zavia Mayne & Company

Service of Statements of Case – Application to pay by Installments not served – No Acknowledgment of Service filed- Default Judgment entered- Whether on facts waiver of irregularity in service –Application to set aside Default Judgment- Whether Summary Judgment or Judgment on Admission permissible

Heard: 15th May, 2014 and February 19, 2015

Cor: Rattray, J.

[1] First Global Bank Limited ("the Bank") instituted proceedings against Garfield Dussard, a customer of the Bank by way of Claim Form filed on the 15th September, 2011 claiming the sum of US$101,034.85 together with interest thereon, arising out of three (3) demand loans extended by the Bank to Mr. Dussard. It contends that in accordance with the Demand Loans, Mr. Dussard executed three (3) Demand Promissory Notes, copies of which were attached to the Claim Form. Despite several requests and demands by the Bank, Mr. Dussard has failed to satisfy his indebtedness.

[2] By Affidavit of Service sworn to by Christopher Thompson and filed on the 21st

October, 2011, Mr. Thompson deponed that on the 24th September, 2011, he served Mr. Dussard personally with "a sealed copy Claim Form filed herein on the 15th September, 2011 with Notice to Defendants, Prescribed Notes to Defendants, blank Acknowledgment of Service of Claim Form, blank Defence and supporting documents attached by handing same to the Defendant who accepted service thereof." No Acknowledgment of Service having been filed, the Bank on the 10th November, 2011 applied for Default Judgment, which Judgment was entered on the 5th November, 2012.

[3] On the 17th April, 2013, Garfield Dussard filed Notice of Application for Court Orders seeking the following Orders-

(i) That the Default Judgment dated the 10th November 2011 and entered in Judgment Binder Number 755 Folio 252 be set aside;

(ii) That the Order for Seizure and Sale of Goods dated November 14, 2012 be set aside;

(iii) Costs; and

(iv) Such further and/or other relief that this Honourable Court deems fit.

The basis of Mr. Dussard's complaint is that the Judgment in Default obtained by the Bank was irregular, due to its failure to comply with Rule 8.16 of the Civil Procedure Rules ("the CPR"). As a consequence, he was not properly served or alternatively, the service of the Claim Form was not sufficient, as there was no proof of service of an Application Form to Pay by Installments. He also based his application on Part 13 of the CPR which outlines the powers of the Court with respect to setting aside or varying a Default Judgment.

[4]. It is perhaps appropriate at this stage before examining the evidence, to set out the provisions of Rule 8.16 of the CPR, which is the launch pad from which Mr. Bernard, Counsel for the Defendant/Applicant propelled his legal submissions. Part 8 of the CPR provides the guidelines to be followed by a Claimant who intends to commence

proceedings in the Supreme Court. Rule 8.16 in particular identifies the documents which must be served with the Claim Form and reads:-

> "8.16 (1) When a claim form is served on a defendant, it must be accompanied by-
>
> (a) a form of acknowledgment of service (form 3 or 4);
>
> (b) a form of defence (form 5);
>
> (c) the prescribed notes for defendants (form 1A or 2A);
>
> (d) a copy of any order made under rules 8.2 or 8.13; and
>
> (e) if the claim is for money and the defendant is an individual, a form of application to pay by installments (form 6);"

[5] The evidence of the Defendant is that he was not served with an application form to pay by installments as mandated by Rule 8.16 (1) (e) of the CPR. In his Affidavit, Mr. Dussard admits being served with a copy of the Claim Form on the 24th September, 2011. He says that he was surprised by this action by the Bank, as it had a duly registered mortgage in respect of property for which he is the registered owner to secure the loan he obtained from that institution. Further, he was aware that the Bank had taken steps to have the property sold pursuant to the powers contained in the mortgage and under and by virtue of the Registration of Titles Act.

[6] On being served with the Claim Form, Mr. Dussard states that he went into the Bank and had discussions with the Assistant Manager, Credit Administration in an attempt to renegotiate repayment terms. His proposal was however rejected. He was advised that the Bank had called in the loan and he would have to make full loan repayment plus accrued interest at once. The Defendant in his Affidavit further states that, as he acknowledged owing the debt and needed time to pay, he did not take the court papers to his Attorney-at-Law in light of what he was informed by the Bank officer.

[7] However, on or about the 17th March, 2013, a Bailiff came to his home to execute

an Order for Seizure and Sale obtained by the Bank consequent on the Default Judgment. Mr. Dussard in his Affidavit asserts that the Bailiff thereafter seized his 2005 Mitsubishi Grandis Motor Vehicle and also marked items of furniture with the intention of returning for them. It was this action, together with the Bank actively taking steps to sell his home to recover monies due, which prompted the Defendant to seek legal representation.

[8] Mr. Dussard goes on to state that on the 10th April 2013, he consulted an Attorney-at-Law and was subsequently advised that the Judgment obtained against him might have been irregular, due to the failure of the Bank to have him served with the form allowing him to apply to the Court to pay the debt by installments.

[9] This application to set aside the Default Judgment obtained against the Defendant was strenuously opposed by Counsel for the Bank, Ms. Chai. She relied on the Affidavit of Christopher Samuda, one of the attorneys-at-law on record for the Bank, in which he outlined his client's dealings with Mr. Dussard as regards this outstanding debt. Mr. Samuda confirmed that the Defendant visited his office on the 13th January, 2012 and acknowledged owing the amount claimed. On being advised that the debt could be liquidated by installment payments, by letter dated 17th January, 2012 the Defendant made an offer in writing to pay $400,000.00 per month and suggested that the debt be capped as of that date. This offer was refused by the Bank in its letter of the 26th January, 2012 in light of Mr. Dussard's history of previous defaults, his failure to show his financial ability to maintain the proposed payments, as well as his refusal to disclose to the Bailiff the whereabouts of the motor vehicle which the Bailiff attempted to repossess. The said vehicle was eventually located by the Bailiff in December, 2012, hidden in the district of Orange Hill in the parish of St. Ann behind some houses on a compound.

[10] Between February, 2012 and April 15, 2013, other efforts were made by the Defendant, or family members on his behalf, requesting information on the amounts outstanding and outlining proposals with a view to settling the Defendant's indebtedness

to the bank. None of these efforts found favour with the Bank. Mr. Dussard was either never able to carry out the proposed terms of settlement or failed to follow up on or respond to queries and correspondence from the Bank. On the 26th April, 2013, having earlier provided the Defendant's stepdaughter with an up to date Statement of Account and while awaiting a specific proposal for settlement from her, this Application to set aside Default Judgment was served on the Bank's Attorneys-at-Law.

[11] One of the main issues for the consideration of the Court is what are the consequences of a Claimant failing to comply with the provisions of Rule 8.16 (1) of the CPR, if in effecting service of a Claim Form on the Defendant, the Claimant fails to ensure that the documents specified in that Rule are also served with the Claim Form. Of what moment is such an omission?

[12] Counsel Mr. Bernard, in his written submissions on behalf of the Defendant, contended that the Default Judgment obtained in this matter was irregular. He relied on Rule 13.2 of the CPR, which so far as is relevant to this matter reads;

> "13.2 (1) Thecourt must set aside a judgment entered under Part 12 if the Judgment 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;"

It is necessary then to examine the provisions of Rule 12.4 which state:

> "12.4 The registry at the request of the claimant must enter judgment against a defendant for failure to file an acknowledgment of service, if-
>
> (a) the claimant proves service of the claim form and particulars of claim on that defendant;
>
> (b) the period for filing an acknowledgment of service under rule 9.3 has expired:
>
> (c) that defendant has not filed-

(i) an acknowledgment of service; or

(ii) a defence to the claim or any part of it;

(d) where the only claim is for a specified sum of money apart from costs and interest, that defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it;

(e) that defendant has not satisfied in full the claim on which the claimant seeks judgment; and

(f) (where necessary) the claimant has permission to enter judgment."

[13] When asked by the Court as to which condition of Rule 12.4 was not satisfied, Mr. Bernard directed the Court to Rule 12.4 (a). The language of that section is clear and refers only to the obligation of a Claimant to prove service of the Claim Form and Particulars of Claim on that Defendant. Nowhere is there mention of an obligation for the service of any accompanying documents as a prerequisite for the Registry to enter judgment.

[14] Counsel then contended that although on a reading of Rule 12.4 there is no express provision that for a Default Judgment to be entered there must be proof of service of any other documents apart from the Claim Form and Particulars of Claim, the failure to comply with Rule 8.16(1)(e) rendered the Default Judgment in this matter irregular, and as such it had to be set aside as of right. In support of this contention, Mr. Bernard relied on the Court of Appeal decision in the case of **Dorothy Vendryes v Dr. Richard Keane and Karene Keane [2011] JMCA Civ 15**.

[15] In that case, the Appellant was served with only the Claim Form and Particulars of Claim. The Prescribed Notes for Defendants (form 1A), the Form of Acknowledgment of Service (form 3) and the Form of Defence (form 5) were not served and the Appellant did not file an Acknowledgment of Service. A Judgment in default of Acknowledgment of Service was entered against the Appellant. The learned Judge at first instance found

that the forms referred to in Rule 8.16(1) all contained important and vital information and was of the view, in light of the importance of the contents of the documents, that service of the said documents was mandatory, unless there was evidence that the Defendant had waived the right to be served with the said documents. He concluded that failure to serve the documents caused the Judgment entered to be an irregularly obtained Judgment, which had to be set aside as of right. On appeal, the Court of Appeal upheld the ruling of the learned Judge on that issue.

[16] In her reply, Counsel for the Bank, Ms. Chai argued that the Defendant was unable to show that there was a breach of the provisions of Rule 12.4, which would prevent her client from obtaining the Default Judgment in this matter. She therefore asserted that the Default Judgment was regularly obtained.

[17] Ms. Chai further argued that if the Court were to find that the Default Judgment obtained was irregular, the Defendant had by his conduct expressly and/or impliedly waived his right to assert and rely on the irregularity. Counsel highlighted as instances of his conduct, Mr. Dussard's admission of his indebtedness to the Bank, his several proposals to liquidate the debt which did not materialise and his actions in concealing his motor vehicle over which the Bank had a Bill of Sale, thereby frustrating the initial attempts of the Bailiff to repossess same.

[18] In support of her contention on the issue of waiver, Counsel Ms. Chai relied on the first instance unreported decision of McDonald Bishop J. in **Joseph Nanco v Anthony Lugg and B & J Equipment Rental Limited.** In that case, the prescribed notes for Defendants and a form of defence were not served on the 2nd Defendant with the Claim Form in accordance with Rule 8.16 (1) (a) and (b) of the CPR. An Acknowledgment of Service was however filed on behalf of the 2nd Defendant, but no Defence, as a result of which a Default Judgment was entered. Through its legal representative, the 2nd Defendant took part in the hearing for Interim Payment and was represented at the Assessment of Damages. A subsequent application by the 2nd Defendant to set aside the Default Judgment as a result of the irregularity in service was

refused on the ground that the 2nd Defendant, by filing an Acknowledgment of Service and taking part in the proceedings, had waived the irregularity in service and had submitted to the jurisdiction of the Court. On appeal, the ruling of the learned Judge was upheld by the Court of Appeal in **B&J Equipment Rental Limited v Joseph Nanco[2013] JMCA Civ 2**.

[19] Ms. Chai also asserted that there was absolutely no defence to the claim of her client, as Mr. Dussard had consistently admitted the debt. As a consequence, he had no real prospect of successfully defending the claim. In such a circumstance, if the Court were to set aside the Default Judgment it would be acting in vain. She entreated the Court, if it were minded to set the Default Judgment aside as an irregularity, to further order either Summary Judgment or Judgment on Admission based on the evidence before the Court.

[20] Counsel further commented on the delay of the Defendant in applying to set aside the Default Judgment. The uncontradicted Affidavit evidence of the Bank's Attorney, Mr. Christopher Samuda, is that Mr. Dussard was served with the Claim Form on the 24th September, 2011 and with the Default Judgment on the 20th November 2012. It was not until the 10th April, 2013 that the Defendant sought legal advice - nineteen (19) months after service of the claim and five (5) months after being served with the Default Judgment. She concluded that this Application must inevitably be denied due to the delay in filing same, the Defendant's admission of his indebtedness and his failure to show clean hands in dealing with the court process. The cumulative effect of his actions she argued, constituted a waiver of his rights to move the Court to set aside the Default Judgment for irregularity.

[21] The starting point for the Court in this matter is to ascertain whether or not the Judgment obtained in default of Acknowledgment of Service is irregular. Whilst it is correct that Rule 12.4, which obliges the Registry to enter a Default Judgment against a Defendant for failure to file an Acknowledgment of Service once the Claim Form and Particulars of Claim have been served, makes no mention of the consequences if none

of the prescribed documents are served at the same time, the Court of Appeal in the **Dorothy Vendryes case** has clearly and unambiguously stated that any such Judgment obtained is an irregularity and must be set aside. The decision of the Court of Appeal in thatcasespeaks directly to the effect of a breach of Rule 8.16. There Harris, J.A. opined -

> "Rule 8.16(1) expressly specifies that, at the time of service, the requisite forms must accompany the claim form. The language of the rule is plain and precise. The word 'must', as used in the context of the rule is absolute. It places on a claimant a strict and an unqualified duty to adhere to its conformity. Failure to comply with the rule as mandated, offends the rule and clearly amounts to an irregularity which demands that, in keeping with the dictates of rule 13.2, the default judgment must be set aside. The learned judge was correct in so doing."

[22] There has been no attempt by Counsel for the Claimant to contend that all the documents, as identified in Rule 8.16 of the CPR were in fact served with the Claim Form on the Defendant. Although in his Affidavit of Service, Christopher Thompson stated that he had personally served the Defendant on the 24th September, 2011 with a sealed copy claim form, with Notice to Defendants, Prescribed Notes to Defendants, blank Acknowledgment of Service of Claim Form, blank Defence and supporting documents, at no time was any effort made on behalf of the Bank to identify those supporting documents. It must therefore be taken as accepted that a form of application to pay by installments was not served on the Defendant.

[23] Rule 8.16 of the CPR mandates a Claimant to ensure that the documents specified therein accompany the Claim Form. The language of the forms is straightforward and uncomplicated, thereby allowing litigants to choose, if they so desire, to represent themselves. A failure to comply, with the provisions of Rule 8.16 (1) may well deprive a Defendant of the opportunity to utilise those forms to his advantage, particularly where he has no legal representative. A failure to comply of necessity

deprives a Claimant of any benefit obtained by way of a Default Judgment. I find therefore that the Claimant is in breach of the provisions of Rule 8.16, the resultant consequence being that the Default Judgment obtained herein is irregular and must therefore be set aside as of right.

[24] The next question is whether based on the evidence the Claimant can successfully maintain that the Defendant, by his conduct, had waived his right to be served with Form 6 - the form of application to pay by installments. A constant thread that runs throughout Mr. Dussard's interactions with the Bank are his proposals, whether feasible or not, for the settlement of his debt, none of which were found to be acceptable by the Bank. The failure to have him served with the form of application to pay by installments deprived the Defendant of the opportunity, which the law allows, to approach the Court for its determination on a proposed payment plan.

[25] The whole issue of service is fundamental to the jurisdiction of the Court. I am not satisfied that discussions between the litigants after service of the Claim Form had been effected, even if such discussions amounted to an admission of the debt, and/or the conduct of the Defendant in this matter can be viewed as or amount to a waiver of any irregularity in service of the mandated Court forms.

[26] Ms. Chai's reliance on the Judgment of McDonald Bishop J in **Joseph Nanco v Anthony Lugg and B & J Equipment Rental Limited,** which was upheld by the Court of Appeal in **B & J Equipment Rental Limited v Joseph Nanco** is misplaced. In that case an Acknowledgment of Service was filed which led Morrison J.A. to conclude:-

> "… the filing of an acknowledgment of service by the appellant, without an application, pursuant to rule 9.6, to dispute the court's jurisdiction constituted a waiver of the requirement of service of the claim form, which remained a valid claim form, notwithstanding the previous non-compliance with rule 8.16(1)."

No Acknowledgment of Service was filed by or on behalf of Mr. Dussard in this matter. I find that the Defendant has taken no step which would amount to a waiver of the Claimant's failure to serve the prescribed documents. As such, I am satisfied that the Default Judgment is irregular and must be set aside as of right.

[27] In light of this finding, I now have to consider one of the consequential Orders sought by the Defendant,that the Order for Seizure and Sale dated the 14th November, 2012 be set aside. The Monthly Report of the Bailiff dated April 9, 2013, indicates that after visiting the given address of the Defendant on nine (9) separate occasions, he was never able to locate the Defendant. In December, 2012, in following up on information received, the Bailiff located the Defendant's motor vehicle hidden behind houses at a compound in Orange Hill, in the parish of Saint Ann and he executed the Writ of Seizure and Sale. The original life of that Writ which was issued in November, 2012 has now expired. The Writ of Seizure and Sale has been executed. There is therefore no basis for an Order to be made setting aside that enforcement process.

[28] Counsel Ms. Chai further argued against the setting aside of the Default Judgment on the grounds firstly, that the Defendant has no real prospect of successfully defending the claim and secondly, due to his delay in applying to set aside the said Judgment. Part 13 of the CPR deals with the setting aside or varying of a default judgment. Rule 13.2 outlines the instances in which the Court must set aside a default judgment, where such Judgment is irregularly obtained or is a nullity. However, it is Counsel's reliance on the provisions of Rule 13.3 which has emboldened her to advance these submissions, the relevant portions of which read 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 acknowledgement of service or a defence, as the case may be."

Those provisions however are applicable only in circumstances where the Default Judgment has been regularly obtained. The Court having found that the Default Judgment is irregular, the submissions, predicated as they are on Rule 13.3 are misconceived and cannot succeed. The Default Judgment must be set aside.

[29] But that is not necessarily the end of the matter. In his Affidavit filed in support of the Application for Court Orders to Set Aside Default Judgment, Mr. Dussard –

(i) admitted being served with a copy of the Claim Form on the 24th September, 2011 (paragraph 3)

(ii) stated that because he acknowledged owing the debt and needed time to pay, he did not take the court papers to his attorney at law (paragraph 6)

(ii) declared that his attorney at law had advised that the Default Judgment obtained against him may have been irregular in light of the fact that he acknowledged owing the debt, but could not pay it all at one time and had not been served with the form of application to pay by installments (paragraph 10).

[30] This Court is obliged when dealing with matters before it to ensure that the overriding objective of the Rules is achieved, that is, to deal with matters justly. This entails ensuring that the matter is dealt with expeditiously and fairly [Rule 1.1 (2)(d)], saving expense [Rule 1.1 (2)(b)] and allotting to it an appropriate share of the Court's resources, bearing in mind the need to allot resources to other cases [Rule 1.1 (2)(e)].

[31] Ms. Chai had argued that were the Court minded to set aside the Default

Judgment, it could on the evidence before it make an Order for Summary Judgment or for Judgment in Admission. Part 15 of the CPR deals with an application for Summary Judgment and Rule 15.2 specifically provides that-

> "15.2 The court may give summary judgment on the claim or on a particular issue if it considers that-
>
> (a) …
>
> (b) the defendant has no real prospect of successfully Defending the claim or issue."

However, Rule 15.4 (1) precludes such a Judgment being entered until the Defendant has filed an Acknowledgment of Service. That rule is clear and unambiguous and states-

> "15.4 (1) Except in a case of a counterclaim a claimant may not apply for summary judgment until a defendant against whom the application is made has filed an acknowledgment of service."

No Acknowledgment of Service having been filed in this matter, the application for Summary Judgment cannot succeed.

[32] It is my considered view however, that the evidence of the Defendant in this matter clearly indicates an admission of the debt due to the Bank. At no time has he raised any challenge as to the amount being claimed. No suggestion has been put forward by Mr. Dussard denying the transactions which led to this suit being filed. There is no allegation by the Defendant that he did not sign the documents which form the foundation of this claim. It would therefore be a waste of the resources of the Court and of judicial time to simply set aside the Default Judgment, in light of the abovementioned findings. Further, it would also be prejudicial to the Defendant the longer this matter wends its way through the Court system, in light of his admission of the debt, as interest continues to accrue until settlement.

[33] Part 14 of the CPR which deals with Judgment on Admission, addresses the

issue where a party admits the claim and, insofar as is relevant, reads as follows:-

> "14.1 (1) A party may admit the truth of the whole or any part of any other party's case.
>
> (2) A party may do this by giving notice in writing (such as in a statement of case or by letter) before or after the issue of proceedings."

This rule speaks to a party admitting the truth of the whole of a party's case by giving notice in writing of such admission after the issue of proceedings. I am satisfied that the Defendant, by his Affidavit filed in support of the Application To Set Aside Default Judgment, has admitted his indebtedness to the Bank.

[34] As a consequence of this admission, I find that the Bank is entitled to Judgment against the Defendant in the sum of US$133,753.09. This sum includes interest calculated at the rates claimed in the Claim Form to the date of Judgment. As the Default Judgment has been set aside as being irregularly obtained, but Judgment entered on admission, I am of the view that with respect to the question of costs, the appropriate order would be no order as to costs.

[35] It is hereby ordered as follows:-

(i) Default Judgment obtained against the Defendant is set aside.

(ii) Judgment entered on Admission against the Defendant in the sum of US$133,753.09

(iii) No Order as to costs.