[2019] JMSC Civ. 13

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2004 HCV 01407

BETWEEN	**AVADAWN FRANCIS**	**CLAIMANT/1st RESPONDENT**
AND	**AUDLEY MALCOLM**	**1st DEFENDANT/APPLICANT**
AND	**MARK GORDON**	**2nd DEFENDANT/2nd RESPONDENT**

IN CHAMBERS

Mr. Ainsworth Campbell for the Claimant/Respondent

Ms. Pauline M. Brown Rose for the 1st Defendant/Applicant

Heard: 16th June, 2017 & 5th February, 2019

Civil Practice and Procedure–Notice of Application to set aside Default Judgment - Rule 13. 3 of the Civil Procedure Rules - Principles to be applied in setting aside a Default Judgment.

Cor: Rattray, J.

[1] On the 10th May, 2003, the Claimant Avadawn Francis, was a passenger in motor vehicle licensed 4244BX, owned and driven by the 1st Defendant, Audley Malcolm, which was travelling in the downtown Kingston area. At the intersection of King Street and Harbour Street, a collision occurred involving the motor vehicle in which the Claimant was a passenger and motor vehicle licensed 4742EA owned and driven by Mark Gordon, the 2nd Defendant, in which the Claimant sustained personal injuries.

[2] As a result of this accident, the Claimant instituted proceedings on the 16th June, 2004, against both Defendants, claiming damages for negligence as a result of the injuries she sustained in the said motor vehicle collision.

[3] The 1st Defendant having been served with the Claim Form and Particulars of Claim filed his Acknowledgement of Service on the 16th December, 2004. However, his Defence was not filed until the 11th April, 2005, outside the forty-two (42) day period prescribed by Rule 10.3(1) of the **Civil Procedure Rules (CPR)** and without the consent of the Claimant or the permission of the Court. Having failed to file his Defence within the stipulated time, the Claimant obtained Default Judgment against the 1st Defendant on the 31st March, 2005.

[4] By way of Notice of Application for Court Orders filed on the 20th July, 2016, the 1st Defendant applied to the Court for an Order that the Default Judgment entered against him be set aside and for his Defence filed on the 11th April, 2005, be allowed to stand. The grounds on which the 1st Defendant sought the aforesaid Orders are set out hereunder: -

a) That the 1st Defendant has a real prospect of successfully defending the claim; and

b) That the Claimant will suffer no prejudice if the Application is granted.

[5] The Application was supported solely by an Affidavit sworn to by Counsel for the 1st Defendant, Ms. Pauline M. Brown Rose and filed on the 27th March, 2017. In her Affidavit Counsel averred, in so far as is relevant, the following: -

> *"2. That I am the Attorney-at-Law on record for the First Defendant/Applicant and I am duly authorized to depone to this affidavit on his behalf.*
>
> *3. That my knowledge of the facts and matters deponed to herein are derived from my involvement in the subject matter and that such facts and matters in so far as they are within my own knowledge, are true to the best of my information and belief.*

4. That the matter involves a personal injury claim brought by the Claimant against the Defendants arising out of a motor vehicle accident which occurred on the 10th May, 2003.

5. That on the 16th June, 2004 the Claimant initiated proceedings against the Defendants to recover damages for negligence arising out of an accident on the 10th day of May, 2003.

*6. That the First Defendant in his defence filed on the 11th April, 2005 in which the First Defendant denied the allegation of negligence against him in the Claim Form and Particulars of Claim and presented his own version of the events stating inter alia that the Second Defendant was the sole cause of the accident in that the Second Defendant negligently drove motor vehicle registered **4742 EA** along a one way street going in the wrong direction thereby causing a collision into the motor vehicle registered **4244BX** being driven by the First Defendant in which the Claimant was a passenger.*

*7. That Ancillary Claim and Ancillary Particulars of Claim were filed against the Second Defendant. I exhibit hereto a copy of the said defence dated and filed on the 11th April, 2005 marked **"PMBR 1"** and copies of Ancillary Claim Form and Particulars of Claim dated and filed on the 11th April, 2005 marked **"PMBR 2"**.*

8. That by way of notice of application for court orders filed on the 8th July, 2005 an application was made by the First Defendant's former Attorney at law to set aside an interlocutory judgment in default of appearance and for the First Defendant to be granted leave to have his defence filed on the 11th July, 2005 stand as effective service.

*9. **That the application was scheduled for hearing on the 25th July, 2006. That on that date neither the Second Defendant nor his Attorney was present and the application was struck out and cost of $8000.00 was awarded to the Claimant.***

10. That on or about September, 2006, I assumed conduct of the matter and notice of Change of Attorney was filed.

11. That there was no activity on the part of the Second Defendant as the file was misplaced.

…

13. That on the 20th July, 2016 a new application was made to set aside the Default Judgment against the First Defendant.

*14. **That the delay in making this application is not due to the fault of the First Defendant, but was primarily to the fact that his file was misplaced**.*

15. Furthermore during the period between September 2006 and July 2016 the Claimant's Attorney took no steps to advance the matter.

16. That I verily believe that the First Defendant has a real prospect of successfully defending the claim on the issue of liability and quantum and I crave leave to refer to the defence filed in this honourable court on the 11th April, 2005.

> *17. That the First Defendant wishes to have the opportunity to contest damages and examine the Claimant on the issue of quantum and liability. The First Defendant would wish to have the Default Judgment now entered against him set aside and the issue of liability be determined at trial.*
>
> *18. That I do verily believe that the First Defendant will be significantly prejudiced if the orders being sought is refused. In the alternative, the Claimant who is obligated to prove General and Special Damages will in no way be prejudiced by the making of the said orders."*
>
> [Emphasis supplied]

[6] The power of the Court to set aside a regularly obtained Default Judgment is contained in Rule 13.3 of the **CPR** which reads: -

> *"(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.*
>
> *(3) Where this rule gives the court power to set aside a judgment, the court may instead vary it."*

[7] Rule 13.3 must be considered along with Rule 13.4 of the **CPR** which outlines the procedure to set aside or vary a Default Judgment. That Rule provides: -

> *"(1) An application may be made by any person who is directly affected by the entry of judgment.*
>
> *(2) The application must be supported by evidence on affidavit.*
>
> *(3) The affidavit must exhibit a draft of the proposed defence."*

[8] The power of the Court to set aside a regularly obtained Default Judgment is a matter for the discretion of the Court, provided that the 1st Defendant has satisfied the requirements of Rule 13.3 of the **CPR**. In order to invoke the Court's discretion, the major factor the Court has to consider is whether the 1st Defendant has a real prospect of successfully defending the claim. If there is real prospect of success in the Defence, then the Court should also bear in mind other factors, such as the reason for not filing a

Defence in time, and how soon the Application to set aside the Default Judgment was made.

[9] Phillips JA in **Merlene Murray-Brown v Dunstan Harper and Winsome Harper** [2010] JMCA App 1, expressed this position as follows: -

> *"[23] In September 2006, the rule was amended and there are no longer cumulative provisions which would permit "a knockout blow" if one of the criteria is not met. 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] & [b] of the rules."*

Whether the 1st Defendant has a real prospect of successfully defending the claim

[10] The "real prospect of success" test referred to in Rule 13.3 of the **CPR**, is similar to that considered by the Court on the hearing of a Summary Judgment Application. This view was outlined by Edwards JA (Ag) (as she then was), in the case of **Russell Holdings Limited v L & W Enterprises Inc and ADS Global Limited** [2016] JMCA Civ. 39, where she posited that: -

> *"[83] A defendant who has a real prospect of successfully defending the claim may still be shut out of litigation if the factors in rule 13.3(2) (a) and (b) are considered against his favour and if the likely prejudice to the respondent is so great that, in keeping with the overriding objective, the court forms the view that its discretion should not be exercised in the applicant's favour. If a judge in hearing an application to set aside a default judgment regularly obtained considers that the defence is without merit and has no real prospect of success, then that's the end of the matter. If it is considered that there is a good defence on the merits with a real prospect of success, the judge should then consider the other factors such as any explanation for not filing an acknowledgement of service or defence as the case may be, the time it took the defendant to apply to set the judgment aside, any explanation for that delay, any possible prejudice to the claimant and the overriding objective.*
>
> *[84] The prospect of success must be real and not fanciful and this means something more than a mere arguable case. The test is similar to that which is applicable to summary judgments (see Blackstone's Civil Procedure 2005, paragraphs 20.13 and 20.14 and the case of **International Finance v Utexafrica sprl** [2001] All ER (D) 101 (May). (See also **ED&F Man Liquid Products v Patel & another** (2003) Times, judgment delivered on 18 April 2003.).*
>
> *[85] In Blackstone's Civil Procedure 2004 paragraph 34.13 the learned editors in reference to summary judgment applications argued that a defendant could show that the defence had a real prospect of success by:*

> *(a) showing a substantive defence, for example volenti non fit injuria, frustration, illegality etc;*
>
> *(b) stating a point of law which would destroy the claimant's cause of action;*
>
> *(c) denying the facts which support the claimant's cause of action; and*
>
> *(d) setting out further facts which is a total answer to the claimant's cause of action for example an exclusion clause, agency etc."*

[11] Lord Woolf MR in **Swain v Hillman** [2001] 1 All ER 91, opined at page 92 that: -

> *"The words, "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or...directed the court to the need to see whether there was a "realistic" as opposed to a, fanciful" prospect of success."*

[12] In the well-known case of **Evans v Bartlam** [1937] AC 473, Lord Atkin at page 480 stated that one of the rules laid down to guide the Courts in exercising its discretion to set aside a regularly obtained Judgment in Default is that: -

> *"…there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence."*

[13] In order to demonstrate to the Court that the 1st Defendant has a realistic prospect of successfully defending the claim, he would have to produce evidence by way of Affidavit to disclose the facts which constitute his Defence. The Affidavit filed in Support of the instant Application was sworn to by Counsel Ms. Brown Rose, where she exhibited thereto, a copy of the Defence and Ancillary Claim filed on behalf of her client on the 11th April, 2005. The question then is whether the Affidavit filed in Support of the Application by Counsel can suffice as an Affidavit of merit.

[14] The case of **Ramkissoon v Olds Discount Co (TCC) Ltd** (1961) 4 WIR 73, which was cited with approval by our Court of Appeal in **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ. 2, is very instructive in the circumstances of the instant matter. In the **Ramkissoon** case it was argued that the Affidavit sworn to by the Defendant's solicitor together with the Defence signed by Counsel and attached thereto, was sufficient disclosure of merit in the Defence and that there was no need for

an Affidavit from the Defendant personally. McShine CJ (Ag), who delivered the judgment of the Court, rejected such a contention and stated at page 75 that: -

> *"In his affidavit the solicitor does not purport to testify to the facts set out in the defence, nor does he swear of his personal knowledge as to the matters going to constitute the excuse for the failure, and so this does not amount to an affidavit stating facts showing a substantial ground of defence."*

[15] The **Ramkissoon** case is distinguishable from the instant matter. Counsel for the 1st Defendant in her Affidavit outlined the facts which she contended would constitute her client's Defence with a realistic prospect of success. She has also deponed that the knowledge of the facts outlined in her Affidavit were within her personal knowledge by virtue of being the 1st Defendant's Attorney-at-Law. Moreover, the Defence exhibited to her Affidavit was signed by her client and was filed on the 11th April 2005.

[16] On an examination of the Defence, the 1st Defendant has denied that he was negligent and attributed the sole cause of the accident to the 2nd Defendant. He alleged that it was the 2nd Defendant who drove his motor vehicle along the one-way street in the wrong direction and collided into his motor vehicle. I am satisfied that the 1st Defendant's Defence, is more than fanciful and is likely to have a realistic chance of success were the matter to proceed to trial.

Whether the 1st Defendant applied to the Court as soon as is reasonably practicable

[17] At this stage, I think it prudent to give a chronology of the matter to highlight the conduct of the 1st Defendant.

[18] The 1st Defendant filed his Acknowledgement of Service on the 16th December, 2004. His Defence ought to have been filed within twenty-eight (28) days from that date, that is, on the 14th January, 2005. This he failed to do. As a result, Default Judgment was entered against him on the 31st March, 2005, which no doubt eventually prompted him to file his Defence on the 11th April, 2005.

[19] On the 8th July, 2005, an Application was filed by the 1st Defendant's former Attorney-at-Law to set aside the Default Judgment and for his Defence filed out of time to stand. That Application was scheduled to be heard on the 25th July, 2006. However, neither the 1st Defendant nor his Attorney-at-Law appeared to proceed with the Application on his behalf. The Application was therefore struck out by Master Lindo (Ag) (as she then was), with costs in the sum of $8000.00 awarded to the Claimant.

[20] On the 11th September, 2006, the 1st Defendant's current Attorney-at-Law filed a Notice of Change of Attorney-at-Law putting herself on the record.

[21] With the Judgment in favour of the Claimant still in place, the hearing of the Assessment of Damages which was originally scheduled for the 24th July, 2007, was adjourned for a date to be fixed by the Registrar. The matter was again scheduled for the 7th January, 2016, and again was adjourned to the 21st July, 2016, as the Court file could not be located.

[22] After being made aware that the matter was adjourned to the 21st July, 2016, the 1st Defendant's Attorney-at-Law filed the instant Application to set aside the Default Judgment on the 20th July, 2016, **ten (10) years** after the first Application was struck out by the Court.

[23] Subsequently, on the 21st July, 2016, Bertram-Linton J (Ag) (as she then was), adjourned the hearing of the Assessment of Damages to the 30th March, 2017, pending the outcome of the Application to set aside the Default Judgment. When the Assessment of Damages came up for hearing on the 30th March, 2017, it was again adjourned by Lindo J, as the Application to set aside the Default Judgment had not yet been heard by the Court.

[24] In light of the foregoing, it would appear that the 1st Defendant has had a history of failing to comply with the prescribed time limits set by the Court and a disregard for the Court process. In all the circumstances, I am of the view that the 1st Defendant has

not applied, as soon as was reasonably practicable to set aside the Default Judgment, since the first Application was struck out in 2006.

[25] Smith JA in the case of **Norma McNaughty v Clifton Wright and Others** SCCA No. 20/2005, a judgment delivered on the 25th May, 2005, expressed his concern at page 12: -

> *"…I am constrained to repeat what the Court of Appeal has said ad nauseam, namely that **orders or requirements as to time are made to be complied with and are not to be lightly ignored.** No court should be astute to find excuses for such failure since obedience to the orders of the court and compliance with the rules of the court are the foundation for achieving the overriding objective of enabling the court to deal with cases justly."*
>
> [Emphasis supplied]

[26] I am satisfied that on observing the conduct of the 1st Defendant as a whole, it cannot be said that he had a genuine continuing intention to set aside the Default Judgment, in order to put himself in a position to defend the case. His own Counsel in 2017 conceded, that the last time she heard from him was in 2006, almost **eleven (11) years** ago. This in my view is unacceptable, particularly in circumstances where it is the 1st Defendant who is seeking relief from the Court. The 1st Defendant had a duty to keep in touch with his Attorney-at-Law and if he had any genuine intention to pursue the matter, he ought to have been in communication with his Counsel and be engaged in active steps to ensure that his matter proceeded in a timely manner.

[27] In addition, the 1st Defendant ought to have been the individual to depone to the Affidavit in Support of the Application instead of his Counsel. It would have also been in his interest to have been present on the day the Application was scheduled to be heard. The effect of the instant Application, in my view, is merely to stall the proceedings to the detriment of the Claimant, who has been waiting for her day in Court having filed these proceedings in 2004.

[28] Furthermore, I cannot accept as a satisfactory explanation for the delay, the submission of Counsel for the 1st Defendant, where she stated that *"the failure to file the Application earlier was not her client's fault but that of Counsel, as she had misplaced*

the client's file." In my view, such an explanation in and of itself, is an acceptance of responsibility without any indication of the steps taken if any, to locate the said file. While bearing in mind that such mishaps do in fact take place, Counsel could have sought the assistance of the Registrar of the Supreme Court, and even the aid of Counsel for the Claimant to assist her in reconstructing her file. There is no evidence that any such approach or attempt was made by Counsel in that regard. It cannot be an acceptable explanation for the delay that her client's file was misplaced some **ten (10) years** ago, and no concerted action taken by Counsel in the protection of and to advance her client's interests.

[29] Phillips JA in the earlier cited case of **Merlene Murray-Brown v Dunstan Harper and Winsome Harper** in examining the conduct of Counsel in that case had this to say: -

> *"[30]…The fact is that there are many cases in which the litigants are left exposed and their rights infringed due to attorneys errors made inadvertently, which the court must review. In the interests of justice, and based on the overriding objective, the peculiar facts of a particular case, and depending on the question of possible prejudice or not as the case may be to any party, the court must step in to protect the litigant when those whom he has paid to do so have failed him, although it was not intended."*

Whether the 1st Defendant has provided a good explanation for the failure to file his Defence in time

[30] Counsel Ms. Brown Rose in her Affidavit has not provided any or any satisfactory explanation for her client's failure to file his Defence in time. This is a critical factor that the Court must bear in mind, in deciding whether to exercise its discretion in setting aside the Default Judgment. It may seem logical that no explanation was proffered for her client's failure, in light of her contention that she has not had any communication with him since 2006. However, no information has been presented to the Court indicating the steps taken by Ms. Brown Rose, if any, to locate or contact the 1st Defendant. This omission is a clear breach of the requirement of Rule 13.3 2 (b) of the **CPR** which bears repeating: -

> *"…In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:*
>
> *(a)…*
>
> *(b)* ***given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be****"*
>
> [Emphasis supplied]

I am satisfied that the use of the word "must" in the above cited rule denotes a mandatory requirement.

[31] In the final analysis, although I am of the view that the 1st Defendant may have had a realistic chance of success, he has failed to apply to the Court as soon as was reasonable practicable and has not provided any explanation for his failure to file his Defence in time. I believe that the prejudice to the Claimant in the present case would be far too great were this Application to Set Aside the Default Judgment to be granted. In the circumstances, bearing in mind the overriding objective of the **CPR** to deal with matters justly, I am of the view that the discretion to set aside the Default Judgment ought not to be exercised by the Court, particularly bearing in mind the severe lack of any or any sufficient evidence explaining the delay. The Claimant has obtained a Judgment in her favour since 2005, and almost **fourteen (14) years** later, she still has not been able to reap the benefits of same.

[32] In the premises, the Court hereby makes the following Orders: -

a) The Application to set aside Default Judgment is refused;

b) Matter to proceed to Assessment of Damages as a matter of urgency;

c) Costs of the Application to the Claimant to be paid by the 1st Defendant, such costs to be taxed if not agreed and paid within twenty-one (21) days of agreement or taxation.