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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL. G050/2001

BETWEEN	CHRISTOPHER GAYLE	PLAINTIFF
A N D	MARK WRIGHT	1 ST DEFENDANT
A N D	RONHAM & ASSOC. LTD.	2 ND DEFENDANT

Heard: September 25, 2003

Mrs. Ingrid Clarke Bennett instructed by Pollard, Lee, Clarke & Co.

Mr. Keith Bishop for the 2nd Defendant

Mr. Mark Wright in person

Straw, J. (Ag.)

This is an application by the 2nd defendant to set aside interlocutory judgement in default and obtain leave to file defence out of time. This application was supported by an affidavit of Mrs. Pauline McKenzie Hamilton on behalf of the 2nd defendant's which was filed on 24th June, 2003.

Background

The Plaintiff commenced an action to recover damages for negligence by Writ of Summons dated 25th April, 2001. The plaintiff is contending that on 25th November, 1999, the first defendant so negligently drove a white Isuzu Truck licenced #1114CC owned by the second defendant (the "said vehicle") so as to cause same to collided with

another vehicle travelling in the opposite direction as result of which the plaintiff who was a passenger in the said vehicle suffered loss and damage.

Subsequent Court document revealed the following:

1. Affidavit of posting certifying that a sealed copy of Writ of Summons and statement of claim filed on 25th April, 2001 was sent by registered mail at Half Way Tree Post Office on 4th May, 2001 to Ronham and Associates (The 2nd defendants) 21/2 Elgin Road.
2. Judgment in default of appearance filed on 8th August, 2001.
3. Interlocutory Judgment filed on 8th November, 2001 and entered on 3rd December, 2001
4. Summons to proceed to Assessment of Damages filed on 10th December, 2001 and set for 18th February, 2002. On 18th February, 2002, minute sheet endorsed that matter adjourned until 22nd February, 02.
5. Memorandum of Appearance filed on 21st February, 2002 by Mr. Keith Bishop for the 2nd defendants stating that the appearance limited to setting aside Writ of Summons and Statement of Claim.
6. Memorandum of Appearance dated 23rd July, 2002 filed by Mr. Keith Bishop for Ronham and Associates Limited.
7. Summons to set aside judgment and leave to file defence out of time dated 25th July, 2002 filed by Mr. Keith Bishop. This is accompanied by an affidavit of Mrs. Pauline McKenzie-Hamilton and who exhibits a defence.

8. This summons heard by Mr. Justice James in chambers on

21st November, 2002. The summons was dismissed with cost to the plaintiff.

9. Notice of Application for Court Orders to set aside judgment and to grant leave to file defence out of time filed on 24th June, 2003.

This is the application that is now being considered.

Arguments

Mr. Keith Bishop argued on behalf of the 2nd defendants that 'new and relevant information' have been put forward by the said defendant, and that there is a defence of merit to the claim. He referred the Court to affidavit of Mrs. Pauline McKenzie-Hamilton filed on 24th June, 2003. At paragraph 17, she states that between the first application to set aside judgment and the present she interviewed several persons and researched relevant documents, some of which she had no control over, in order to provide her attorney-at-law with new and relevant information. Paragraph 18 a to e disclosed the new and relevant material.

In essence, Mr. Bishop submitted that, in the first affidavit of Mrs. Pauline McKenzie-Hamilton filed on 25th July, 2002, it was said that the plaintiff was a sideman assigned to a particular truck, that he went on a frolic of his own on the truck driven by the 1st defendant without permission or authority. The second affidavit reveals in fact that the plaintiff had been advised one week prior to the accident that he would be laid off and had requested to do odd jobs, that he was given odd jobs 'such as moving boxes from the storeroom and sweeping the office,' that he was not given permission to be either a

passenger or a sideman on the vehicle driven by the 1st defendant; that the said vehicle carried a sign marked "NO RIDERS."

Mrs. Ingrid Clarke Bennett tendered written submission on behalf of the plaintiff.

In essence, she made reference to rule 13.3(1) of the Court Procedure Rules (2002). This section deals with the grounds on which a defendant may apply to and succeed in setting aside a default judgment. This is the second application by the 2nd defendant to set aside judgment obtained by the plaintiff. The crucial issue is whether new and relevant material has been presented for consideration.

The relevant provisions reach as follows:

13.3 (1) Where rule 13.2 does not apply, the court may set aside a judgment entered under part 12 only if the defendant:-

- (a) Applies to the court as soon as reasonably practicable after finding out that judgment has been entered;
- (b) Gives a good explanation for the failure to file an acknowledgement of service or a defence as the case may be; and
- (c) Has a real prospect to successfully defending the claim.

She submitted that the 2nd defendant's application is not made on the basis of any of these grounds but on the basis that there is a defence of merit. That this was not the issue for the Court to consider but it was whether the 2nd defendant had a real prospect of succeeding in defending the claim.

Reasons for Judgment

The court considered the 'new and relevant information' as sworn to in the affidavit of Mrs. Pauline McKenzie-Hamilton dated 24th June, 2003 on behalf of the second defendants. The Court also considered this new information within the context of the history of the case.

The accident occurred on the 25th November, 1999. Mr. Delroy Chuck, an attorney-at-law was in communication with the plaintiff's attorneys since, at least, August 2001 on behalf of the second defendants. However, no appearance had been entered on their behalf until Mr. Keith Bishop filed a notice of CHANGE OF ATTORNEY on 18th February, 200. He subsequently filed a Memorandum of Appearance on 21st February, 2002, no doubt after having discovered that there had been no appearance previously.

In her affidavit filed on 24th June, 2003, Mrs. McKenzie-Hamilton stated that there had been an exchange of letters between both parties since February 2001. She, however, only become aware 'a couple of months ago of Court papers' when she returned from abroad.

Her first affidavit dated 25th July, 2002 with a defence attached was filed about 21/2 years after the accident and just over 1 year after exchange of letters commenced.

The second affidavit which contained the 'new and relevant information' was filed about 1 year after the first.

This court considers that it is inconceivable that it took all this time for the plaintiff's employers to ascertain the exact nature of his employment at the time of the

accident and the circumstances surrounding the same. This is something they must have, in all seriousness, averted their minds to, if not at the commencement of the exchange of letters, then at least by the time an Appearance was entered on their behalf.

Under the Civil Procedure Rules (2002), part 13.3 (1) (c), there is a burden placed upon the defendants to satisfy the court that they have 'a real prospect of successfully defending the claim.'

In ED&F Man Liquid Products Ltd., vs. Patel and ANR (a case of persuasive authority from the Court of Appeal in England) Case no. [C2003] EWCA A3/2002/1450, the Court discussed the issue of the defence having 'a real prospect of successfully defending the claim under rule 13.3 (1) of the Civil Court Procedure Rules.

Lord Justice Potter stated as follows:

(per paragraphs 7&8)

"What is clear is that, in drafting the Civil Procedure Rules the draftsman adopted the phrase "real prospect of successfully defending the claim" for the purpose of both Civil Procedure Rules 13.3 (1) and 24.2 and, subject to the question of burden of proof, may be taken to have contemplated a similar test under each rule. It was stated by Lord Woolf MR in *Swain v Hillman* (2001) 1 ALL ER 91 at 92 that:

"The words "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospect of success... They direct the Court to the need to see whether there is a 'realistic' as opposed to a "fanciful" prospect of success." "I regard the distinction between a realistic and fanciful prospect of success as appropriately reflecting the observation in the *Saudi Eagle* that the defence sought to be argued must carry some degree of conviction. Both approaches require the defendant to have a case which is better than merely arguable, as was formerly the case under RSC order 14."

It is necessary therefore for that the merits of the proposed defence be considered to some extent. It is clearly understood that the issues are not to be tried or determined at this stage.

However, having considered all the circumstances as outlined above, I am of the view that the 'new and relevant information' does not carry the degree of conviction necessary to satisfy the Court that there is 'a real prospect of successfully defending the application and for leave to file defence out of time is dismissed.

Mrs. Hamilton affidavit fails to establish with any sincerity how this 'new and relevant information' could have been overlooked for such an extended period of time. It does not carry the degree of conviction necessary to satisfy the court that there is a real prospect of unsuccessfully defending the claim.

The application to set aside the interlocutory judgment, for leave to file defence out of time dismissed.