[2019] JMSC Civ 166

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017 HCV 02490

BETWEEN	**GREGORY GILCHRIST**	**CLAIMANT**
AND	**NORMAN MURRAY TRADING AS NORMAN MURRAY'S QUARRY**	**DEFENDANT**

IN CHAMBERS

Jason Jones for the Claimant/Respondent

Lawrence Haynes for the Applicant/Defendant

Heard: July 2, 2019 and July 31, 2019

Default Judgment entered - Application to set aside default judgment - Whether or not default judgment was regularly obtained – Affidavit of service – Identification of Defendant - Rule 13.3 Civil Procedure Rules (CPR) 2002 as Amended 2006 - Test to be applied - Real prospect of success - Whether judgement should be set aside as of right - Overriding objective.

T. HUTCHINSON, J (AG.)

INTRODUCTION

[1] The Applicant/Defendant Norman Murray has filed a notice of application for Court orders in which he is seeking the following order;

1. That the interlocutory judgment in default entered on the 23rd day of August 2017 be set aside as being irregularly obtained.

2. The Final Judgment on Assessment of Damages dated the 24th of July 2018 by the Honourable Mr Justice Evan Brown be set aside as being irregularly obtained.

3. All subsequent proceedings arising out of the above including an Order for Seizure of Goods be set aside.

[2] The Orders are being sought on the basis that the Default Judgment entered had been irregularly obtained as the Applicant/Defendant was never served with the Claim Form, Particulars of Claim, Acknowledgement of Service Form, Application to Pay by monthly instalments and Defence Form on the 5th of August 2017 as contended by the Claimant.

BACKGROUND

[3] The background to this matter is on the 4th of August 2017, the Claimant Gregory Gilchrist filed a claim against the Defendant in respect of injuries he alleged he sustained while at work on the Defendant's property on the 28th of September 2015. The Claim Form and accompanying documents were handed to Process Server Mohan Escoffery for service on the Defendant and he later provided an Affidavit of Service in which he stated that service had been effected on the Defendant on the 5th of August 2017.

[4] As a result of no acknowledgment of service being filed by the Defendant, the Claimant applied for and obtained Judgment in Default on the 23rd of August 2017. The interlocutory judgment in default and accompanying documents in respect of the assessment were handed to the same process server and he subsequently produced an affidavit of service dated the 24th of July 2018 in which he speaks to having served the Applicant/Defendant on the 28th of June 2018.

[5] An assessment of damages hearing was held on the 24th of July 2018 when final judgment was entered in favour of the Claimant. Following the assessment, the Claimant obtained an order for seizure and sale of the Defendant's goods. The

Application to have the Default Judgment set aside as irregularly obtained was then filed on the 14th of August 2018.

APPLICANT'S SUBMISSIONS

[6] In advancing his submissions on behalf of the Applicant, Counsel has taken issue with the Affidavit of the Process Server which was filed on the 17th of August 2017. He has submitted that an examination of same reveals that it does not comply with Rule 5.5(1). Counsel outlined, that paragraph 3 of the affidavit which reads 'the Defendant was not previously known, but identified himself as the Defendant and accepted service of the documents' was not identification in the true meaning of the rule, as the Defendant would be seeing the documents for the first time and as such would not know that they referred to him.

[7] He submitted that the Rule as crafted presupposes someone with prior knowledge of the Defendant identifying him. In the absence of this type of evidence, Counsel contended that the Claimant was not entitled to have Default Judgment entered as they had failed to prove service on the contents of the affidavit filed.

[8] Mr Haynes also submitted that the situation was not improved by the actual evidence of the witness as while he indicated that he was actually assisted to identify the Defendant by someone who was present at the business place, this had not mentioned in his affidavit. Mr Haynes asserted that the situation was compounded by the fact that the witness was unable to explain why this omission occurred. It was suggested by Counsel that the reason why there was no explanation is because this evidence is nothing more than a recent fabrication by the witness.

[9] The second point which was raised by Mr Haynes as providing a proper basis on which the Court should set aside this default judgment, is that the Defendant has a good defence with a real prospect of defending the claim successfully. Under this heading, it has been asserted that the Claimant has sued the wrong party as the Defendant is not the owner of the operations where the Claimant sustained his

injury. This submission is based on the claim that a Limited Liability company by the name of Demms Enterprises 2007 Limited was incorporated on the 21st of May 2007 and superseded the sole trader operation which the Defendant had; to which reference had been made in the Claimant's affidavit dated 9th November 2018.

[10] In support of his submissions, Counsel has relied on the decisions of ***Salomon v Salomon [1897] A.C. 22*** and ***J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry***. The principle being relied on in both cases is that the independent corporate existence of an entity would militate against an action being brought against individuals associated therewith instead of the company or corporation itself.

[11] It was also highlighted by Mr. Haynes that there had been no delay by the Defendant in bringing this application as he instructed his Counsel to file same as soon as he become aware of the Judgment published in the newspaper. In respect of the cases cited and relied on by Counsel for the Claimant, Mr. Haynes submitted that the majority of these cases could be distinguished as they related to Judgments regularly obtained where service was not being challenged. He has also submitted that he relies on the dicta of Sykes J, as he then was, in ***Sasha-Gaye Saunders v Michael Green etal 2005HCV2868*** which states as follows in part;

> Non-service goes to the root of any judgment obtained in default of acknowledgment of service or defence. If judgment was obtained in such circumstances it would have to be set aside as of right.

[12] In respect of the decision of ***Dexia Credio Spa v Regione Piemonte [2014] EWCA Civ 1298,*** Counsel submitted that this decision can also be distinguished from the instant matter as there was considerable delay in applying to have the default judgment set aside which isn't the situation in the instant matter. It is also submitted that this was similar to the situation in ***Guardsman Alarms Ltd v***

Graymill Engineering Ltd and Noel Gray 2007HCV001113 which Mr Haynes noted suffered not only from a delayed application but also a defence with no merit.

[13] It was also submitted by Mr. Haynes that in circumstances where the Claimant has not been served, the approach of the Court has been clear and consistent in having the Judgment set aside and urged this Court to follow suit.

CLAIMANT'S/RESPONDENT'S SUBMISSIONS

[14] In advancing his submissions on behalf of the Claimant, Mr Jones indicated that the crucial issue for determination by the Court is that of credibility. It was Counsel's contention that the Applicant has not been truthful with the Court in his responses. He has sought support for this point, by making reference to the assertion of the Applicant in his affidavit that the proceedings were brought against the wrong party since the quarry business is owned and operated by a limited liability company called Demm Enterprises Limited of which he is a mere shareholder. Counsel has asked that the Court contrast this assertion with the contradictory information provided by the Ministry of Transport and Mining which states;

> Please note that our records have shown that Mr. Norman Murray is the licensee of quarry located at Woodbourne District in the parish of St. Thomas (QL1748). He has been the licensee from the year 2005 to present which makes him the owner of the quarry but not necessarily the operator.

[15] Mr. Jones submitted that the Court should not be deceived by the poor attempts made by the Applicant to clarify this in re-examination as he was untruthful in other respects. On this point reference was made to the fact that the witness said on oath that he was in fact the owner of the quarry. Counsel has also asked the Court to take note of his hesitation in responding to the question whether his name was on the sign, something that shouldn't be controversial.

[16] The conduct of the Applicant was contrasted to that of the Process Server Mr. Escoffery. Mr. Jones has pointed out that unlike Mr. Murray, he was straight forward in his responses as he admitted that his personal address did not appear in his affidavit not because of any intention to deceive but for security reasons because of the nature of his employment. It was submitted that when he came to give his viva voce evidence he had no hesitation in providing his home address and all of this should be noted by the Court.

[17] Counsel also submitted that although the affidavit filed on the 17th of August 2017 did not state that the Defendant was pointed out to the witness he has provided this additional information on oath and it ought to be considered by the Court in examining the accuracy of the identification.

[18] In addressing the issue as to the name of the district, which appears in the affidavit of service as 'Hoodburn' instead of Woodburn, Counsel referred the Court to the response of the witness who indicated that it was a typo as the district he attended was Woodburn.

[19] In his submissions on whether the Applicant should be given the opportunity to have the default judgment set aside, Mr. Jones stated that before that could occur the Court would also have to consider the provisions of 13.3 of the CPR. He also made reference to a number of cases from the local and English Courts in examining what the Courts have required of Applicant's in meeting these specific provisions of the Rules.

[20] It was highlighted that in the decision of ***Sasha-Gaye Saunders v Michael Green et al 2005HCV2868*** the Court cautioned against interfering with a default judgment as in the absence of some explanation for failing to file an acknowledgment of service or the defence the prospect of setting aside a judgment obtained in default should diminish. The rationale for this being that a claimant who has secured judgment has something of great value. Counsel noted that the sentiment was

echoed by the Court in ***Merlene Johnson v Ainsworth Campbell 2012HCV02491.***

[21] Mr. Jones also made reference to the UK Court of Appeal decision ***Dexia Crediop SPA v Regione Piemonte [2014] All ER 125*** in support of his position that the burden rests upon the defendant to satisfy the Court that there is good reason to satisfy the Court that a judgment regularly obtained should be set aside. It was also noted therein that depriving a claimant of a regular judgment which he has validly obtained is not something which a court will do lightly.

[22] Counsel also noted that the Defendant had not presented any document in support of his contention that the Claimant was not employed to him even though it was open to him to do so. It was also submitted that the evidence produced from the Ministry of Mining calls into question the Applicant's assertion that he isn't the proper party to this suit.

[23] A number of additional cases were cited to ***include Guardsman Alarms Limited v Graymill Engineering Ltd 2017HCV01113, Seymour Ferguson v Ameco Car Inc etal 2011HCV07856 and Standard Bank Plc etal v Agrinvest International Inc etal [2010] EWCA Civ 1400*** all of which examined the approach of the local and English Courts which required that an Applicant satisfy the requirements of the rules in order to move the Court to act in this manner. It was submitted that the Court should accept Mr. Escoffery as a witness of truth on the issue of service and find that the Applicant has failed to provide an acceptable reason for failing to file an acknowledgment of service.

[24] Mr. Jones also asked the Court to consider how promptly the Applicant acted in making his application to set aside the default judgment as well as the prejudice to the Claimant who has already obtained his Judgment. He has pointed to his disability as he suffered the loss of an arm. The Court has also been asked to consider the impact of same on the Claimant's prospect on the job market. Counsel

also asked the Court to consider that a trial date is now 5 years away and the Claimant would suffer grave prejudice as a result of this wait.

VIVA VOCE EVIDENCE

[25] In considering the application which is before me, careful note has been taken of the affidavits of both Mr. Escoffery and Mr. Murray as well as the submissions made by Counsel for the respective parties. This was one of those cases however where the Court also had the benefit of seeing and hearing from both individuals on the issue of service and note has been taken of important aspects of their evidence.

[26] Mr Murray was the first witness who testified and in examining the issue of his credibility, the following extracts of his evidence stood out for consideration;

Q: Do you agree there is a sign there with your name on it?

A: Yes Sir

Q: What does the sign say?

A: Sand, stone and gravel, my name and one of my number.

Q: Is it Norman Murray on the sign or Norman Murray's Quarry?

A: I can't remember if it is Norman Murray only or Norman Murray's Quarry.

Further on in the cross examination, the following exchange also stood out;

Q: Are you the owner of the quarry?

A: Yes Sir

Q: In 2018, did you present your Attorney with Court documents in this matter?

A: Yes Sir.

[27] In re-examination Mr. Murray was asked by his Attorney as to the actual ownership of the quarry in light of his response to Mr Jones which stood at odds with his affidavit in where it had been stated that the Quarry business was owned and operated by Demms Enterprises in which he was a mere shareholder and his response was as follows;

A: Because the quarry licence is in my name I said I own it but the quarry business is owned by Demms Enterprises.

He was asked by the Court who was the owner of Demms Enterprises and his answer was;

A: I am the Director.

In respect of Mr Escoffery, there were also areas of his evidence that bear highlighting;

Q: In relation to these proceedings it is true you did not know the Defendant before?

A: Correct

Q: You were given his address by someone else?

A: It was on the documents but it is a District so would have to ask people in the area how to get to this district.

The exchange continued;

Q: Did anyone accompany you there when you went to serve the document the first time?

A: No

Q: No one pointed out the person Murray to you when you went to serve the document

A: Yes, someone did.

It was suggested to him that this was not in his affidavit and he indicated that it should be there. He was shown the affidavit and the exchange continued;

Q: Do you agree with me there is no mention in your affidavit of someone pointing out the person to?

A: Agree

Q: Do you agree that it was important to put that in your affidavit?

A: Yes, it should have been.

[28] It was suggested to him that this was not in his affidavit and he asked if he could explain. He was given the opportunity to provide this explanation in re-examination which is referred to further down in this review.

[29] Mr Escoffery was asked about the circumstances under which he served the second set of documents and he outlined visiting seeing the same premises where he saw the Defendant and gave him the papers. He was asked if he agreed that no where in that narrative did he indicate that the Defendant had identified himself to him although this had been said in his affidavit. Mr Escoffery indicated that he had served him before so he knew who he was going to this time.

[30] In giving his explanation as to what happened the first time he went to serve the documents he said;

A: On arrival at the compound there was a group of men on the premises. There was a brown guy with bleach face and tattoos he pointed out the defendant to me.

He was asked by the Court if there was any reason why there was no mention in the affidavit of the Defendant being pointed out to him and his response was as follows;

A: I'm not sure why I didn't put it in the affidavit that Mr. Murray was pointed out to me.

Before leaving this area, it should be noted that he was questioned why he didn't put his home address in the affidavit which bore his work address he stated that it was for security purposes given the type of work that he did.

ANALYSIS/DISCUSSION

[31] In respect of the application that has been filed on behalf of the Defendant both Attorneys have made reference to the respective rules as well as the relevant cases which the Court must consider in arriving at its decision. The issue however is a narrow one as the real question for determination is whether the Court accepts the contention of Mr. Murray that he was never served with any documents filed on behalf of the Claimant in this matter. Central to the Court's decision is the credibility of the respective parties. As stated above, the Court wasn't left to determine credibility on the basis of written documents but had the benefit of seeing and hearing from both the Applicant and the Process Server.

[32] As I conducted my examination of both individuals I made a number of observations of the account of the Applicant who was the first to give evidence. In response to a direct question asked by Counsel for the Claimant, Mr. Murray stated that in 2018 he presented Court documents to his attorney in relation to this matter. The Court was struck with the significance of this response as in his affidavit as well as on oath Mr. Murray had denied receiving any papers in this matter whether in 2017 or 2018. If this is true, it begged the question from whom did he receive the papers in order to give them to his attorney?

[33] The Court was also left to ponder, if Mr Murray gave the papers to his attorney in 2018, how should the Court treat with his assertion that he first heard about this matter while reading the Sunday paper on the 29th of June 2018?

[34] As I continued to examine his credibility, it was noted that in cross examination Mr. Murray admitted being the owner of quarry. In re-examination however when asked by his attorney about the response which stood in contradiction to his affidavit Mr. Murray replied that he had said that he is the owner as the licence is in his name but the quarry business is owned by Demm Enterprise Limited.

[35] This response also left the Court in some doubt as to the witness's veracity as if this was in fact true it had been open to him to provide this response under cross examination. His response to a follow up question from the Court was even more curious as when he was asked who was the owner of Demms Enterprise Mr Murray responded by saying that he is a Director but nothing was said about the owner. This response stood in contrast to his evidence in chief as in his affidavit he had described himself as a mere shareholder of that company.

[36] In considering the submission that the wrong party is before the Court, I have taken note of the certificate of incorporation of Demm's Corporation and its incorporation date of the 21st of May 2007. The challenge that the Court had on this point was, apart from the Certificate, there were no documents to assist with the question whether the Certificate presented actually referred to the business which he had been operating as a sole trader. There was nothing to show the physical address of Demms Enterprise or even the type of business being engaged in by them. It was difficult in those circumstances to find that this was evidence capable of rebutting the Claimant's assertion that Norman Murray trading as Norman Murray's Quarry was the proper party, especially given their support for same in the documents produced from the Registrar of Companies.

[37] The Applicant's inability to recall whether the sign on the outside of the business place read Norman Murray or Norman Murray's Quarry also had a negative impact on his credibility. It was his evidence that this is a business in which he has been involved for years and he is usually present at the location, for him to have a difficulty answering such a straight forward question raised general questions as to his truthfulness as a whole.

[38] In respect of Mr. Escoffery, it was noted by the Court that while his affidavit made no mention of him being assisted to identify the Defendant, in viva voce evidence he provided a detailed account of the Defendant being pointed out to him by a bleached and tattooed individual. He accepted that it was important that this identification should have been placed in the affidavit and he could offer no explanation for this omission. Counsel for the Applicant has submitted that this was tantamount to recent fabrication as having failed to provide compelling evidence as to identification it was convenient for the witness to attend and say this.

[39] In respect of this submission, I agree with Mr Haynes that this is the sort of information that one would expect would have been included in the affidavit. In deciding how to treat with this I carefully examined the demeanour of the witness as he gave this account and he struck me as truthful. He accepted that while it was important to include this information, he had simply failed to do so. He made no effort to cobble together a reason for its absence which is the type of response which one may expect from someone who is fabricating an answer, he chose instead to be frank and he admitted that he couldn't offer a reason why it wasn't included.

[40] In relation to the issue of service on the second occasion, I note that the viva voce account of the witness differs from his affidavit on the point of whether or not the Defendant identified himself to him again. In responding to cross examination and re-examination it was the assertion of the witness that this did not occur as it wasn't necessary since he had served the Defendant before and knew who he was. He accepted however that this was stated in the affidavit which was signed by him.

[41] In assessing his reliability on this point, I was again struck by the very candid approach of the witness when confronted with this discrepancy. I accepted and believed his explanation that the content of the affidavit was an error as having served the Defendant once before there was no need for him to identify himself to him a second time as he was already familiar with him. My acceptance of this assertion is buttressed by the fact that I believe that it was the court documents

which were served on the defendant in 2018 which he later passed on to his Attorney.

[42] In respect of the witness's failure to put his address in his affidavit, I was not persuaded that this was a point which affected his credibility as his explanation for this was quite plausible. Additionally, his willingness to give his address when testifying on oath only supported this conclusion as having been asked where he lived he did not hesitate to provide an answer.

[43] Having conducted this review as outlined above, I had no difficulty accepting the account of Mr. Escoffery over that of Mr. Murray as I found Mr. Murray to be inconsistent and lacking in credibility. On the question whether service had been effected, I am satisfied on a balance of probabilities that Mr. Murray had in fact been served on both occasions as outlined by Mr. Escoffery.

[44] The next question for the Court having found that Mr Murray had been properly served, is whether the Judgment should be set aside to allow him to present his defence. On behalf of the Defendant, Mr. Haynes has said that this should be the Court's approach. He has sought to emphasise to the Court that his client has a defence of merit and acted promptly to apply to the Court as soon as he became aware of the Judgment. It was also noted by him that this Defence was outlined by Mr. Murray in his draft defence which is attached to his affidavit.

[45] The approach to be taken by the Court in deciding this issue is outlined in rules 13.3(1) and (2) which reads as follows;

> **13.3 (1)** The court may set aside or vary a judgement 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.

[46] A number of authorities have been referred to in the course of this hearing and I do not believe that it is in dispute between that the parties that the primary test for the Court as seen in these decided cases is that which is set out at Rule 13.3 (1). In coming to its decision however a Court should also consider the criteria set out at 13.3(2)(a) and (b) and I propose to address these rules first in the course of my examination of the issue herein.

13.3 (2) (a) Has the Defendant applied to the Court as soon as is reasonably practicable after finding out that judgment has been entered

[47] In respect of this ground, the evidence which has been referred to above shows that the Notice of Default Judgment along with accompanying documents was served on the Applicant on the 28th day of June 2018. Final Judgment was entered on the 24th of July 2018 and this application made on the 14th day of August 2018. A period of just under two months would have elapsed between the date he received notice of the Default Judgment and when the application was filed before the Court. In considering the question whether this was an inordinate delay, I have considered the decisions of ***Michelle Daley etal v Tonyo Melvin etal C.L.2002/D-034 and Blossom Edwards v Rhonda Edwards 2013 HCV 04910*** where delays of 31/2 months and 7 months were not found to be a bar to an application to set aside.

[48] I also take note of the fact that the final judgment was not entered until the 24th of July 2018, which was less than a month before the application was made. In the circumstances I am in agreement with Mr. Haynes that the Applicant acted

promptly once he received notice of this judgment and the Court should note this in his favour.

13.3 (2) (b) Given a good explanation for the failure to file an acknowledgement of service or a defence,

[49] The explanation which has been offered for this failure has already been dealt with as it was Mr. Murray's contention that he hadn't done so because he hadn't been served, as noted above, the Court did not believe or accept this explanation.

Defendant has a real prospect of successfully defending the claim – 13.3(1)

[50] In ***Swain v Hillman and another [200] 1 All ER 91*** it was noted that the primary test for setting aside a default judgment regularly obtained is that the defendant must have a real suspect of successfully defending the claim rather than a fanciful one. In determining whether the test has been satisfied, there must be a defence on the merits to the requisite standard.

[51] The evidence which has been put forward in this regard is two-fold, the first that the wrong party has been sued as the correct defendant should be Demms Enterprise. The second limb of the Defence is that the Claimant was an uninvited guest on the grounds of the quarry on the day in question and had sustained his injury by placing his hand inside the stone crushing machine while it was in use without having any authorisation or permission to do so.

[52] These assertions have been met with criticism by Counsel for the Claimant who has produced documentation to challenge the former and has presented the evidence of Mr. Gilchrist to challenge the latter. He has also pointed to the absence of any employment record produced by the Defendant in proof of his contention that the Claimant had not been employed by him.

[53] While it is recognised that there may be some question as to the veracity of the first limb of the defence, the Court recognises that the second limb raises a defence of merit as a Court could realistically accept the contention of the Defendant over that of the Claimant. Where such a possibility exists, the Court has to afford a defendant, delinquent as he may be, the opportunity of presenting his defence, the overriding objectives require no less.

CONCLUSION

[54] In light of the foregoing, I am satisfied on a balance of probabilities that the default judgment should be set aside on the basis of rule 13.3. I have arrived at this position having given careful consideration to the cases referred to by Counsel for the Claimant, the additional authorities mentioned above as well as the pertinent evidence herein.

[55] Accordingly, the orders of the Court are as follows;

1. The default judgment and all orders flowing therefrom are set aside pursuant to Rule 13.3
2. The Defendant is to file his Defence within 14 days of the order herein.
3. If the Defendant fails to file his Defence as ordered at 2, judgment to be entered against him.
4. Costs of the matter up to today's date is awarded to the Claimant to be taxed if not agreed.
5. Claimants Attorney to prepare, file and serve order herein.