**[2023] JMSC Civ.118**

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CLAIM NO. SU2020CV03127**

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| **BETWEEN** | **ANDRE GILLESPIE** | **CLAIMANT** |
| **AND** | **KANDRENE LEWIS** | **1ST DEFENDANT** |
| **AND** | **ROMAINE GRAY** | **2ND DEFENDANT** |

**VIA ZOOM CONFERENCE**

Mr. Kemar Sutherland for the Claimant instructed by Shelards

Ms. Houston Thompson for the1st Defendant instructed by Dunbar & Co.

2nd Defendant absent and unrepresented

**Heard – June 15, 2023 and July 31st, 2023**

**Application to set aside default judgment – Rule 13 of the Civil Procedure Rules (CPR) – Requirements to set aside default judgment – Real prospect of success in defending claim is foremost consideration – Applicant must have acted promptly and have a good explanation for failure to comply – Court still has discretion to set aside judgment where application not prompt and there is no good explanation**

**T. HUTCHINSON SHELLY, J**

**INTRODUCTION**

**[1]** This application for the setting aside of a default judgment was filed on behalf of the Applicant/Defendant on the 25th of October 2022. It was supported by an affidavit from Kandrene Lewis, the 1st Defendant and owner of the vehicle involved in the collision, in which she seeks the following orders:

1. *That the Default Judgment entered herein against the 1st Defendant be set aside;*

2. *The 1st Defendant be permitted to let stand her Defence filed August 18, 2022 and served on August 22, 2022;*

3. *That the 1st Defendant be permitted to let stand her Acknowledgement of Service of Claim Form filed August 18, 2022 and served on August 22, 2022 ; and*

4. *That the 1st Defendant be granted any other relief as this Honourable Court deems just.*

The grounds on which the Applicant is seeking the following orders are as follows:

1. ***Rule 13.3*** *allows for a default judgment to be set aside once the Defendant has a real prospect of successfully defending the claim;*

2. ***Rule 26.1 (c)*** *permits the court to extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed;*

3. *That personal service was dispensed with by order of the court on October 5, 2020 and Substituted Service was effected on the 1st Defendant's insurer, Advantage General Insurance Company Limited on March 31, 2021;*

4. *That the 1st Defendant's insurer was unable to locate her to bring the contents of the Claim Form and Particulars of Claim to her attention. Dunbar & Co. Attorneys-at-Law was retained to also try and locate the Defendant and/ or set aside the Order for Substituted Service;*

5. *That Dunbar & Co. located and made contact with the 1st Defendant in or about the month of August 2022.*

6. *That the 1st Defendant has a good Defence to the Claim being made. The 1st Defendant avers that the 2nd Defendant was lawfully proceeding along the roadway. He indicated his intention to turn right, stopped, and proceeded to turn when it was clear and safe to do so. Suddenly and without warning, a motor bike overtook the line of traffic that had stopped behind the 1st Defendant's vehicle and collided into the right rear of the 1st Defendant's vehicle. It was the negligence of the rider of the motor bike that caused the accident.*

7. *The Defence of the 1st Defendant was not entered in time as the insurer, Advantage General Insurance Company Limited, were served with the initiating court documents by way of substituted*

*service on March 31, 2021. The 1st Defendant was not located until August 18, 2022.*

8. *This application was made as soon as practicable after finding out that default judgment had been entered against the 1st Defendant. The Claimant's Attorneys at-Law, Shelards informed Dunbar & Co Attorneys-at-Law that default judgment has been entered via letter dated August 25, 2022.*

9. *That the 1st Defendant now seeks the court's assistance in formally entering her Defence and setting aside the Default Judgment.*

10. *The interest of justly disposing of this case.*

**BACKGROUND**

**[2]** On the 8th of October, 2014 at about 4:45 p.m., the Claimant, a Police Corporal, was riding his green Kawasaki Motorcycle registration 4099F along Whitehall Avenue, Kingston 8, St. Andrew heading towards Mannings Hill Road. The 2nd Defendant was driving a Grey Nissan AD Expert Motor Car registration number 8115 GC with the 1st Defendant onboard. The Nissan motorcar was travelling directly in front of the Claimant along Whitehall Avenue, Kingston 8, St. Andrew and both vehicles were heading towards Mannings Hill Road, Kingston 10, St. Andrew.

**[3]** Upon reaching the vicinity of Cameron Lane, the 2nd Defendant made a right turn unto Cameron Lane. The Nissan motorcar collided into the Claimant who was attempting to overtake same. It is the Claimant's position that the turn was sudden as no signal had been given of an intention to turn.

**[4]** As a result of the accident, the Claimant and his motorcycle were hit resulting in him sustaining a number of severe injuries, damage and loss. On the 20th of August 2020, the action was commenced. An application for substituted service and extension of the life of the claim form was filed on the 29th of September 2020 as a result of challenges in serving the 1st Defendant. On the 31st of March 2021, the 1st Defendant's Insurers were served and Default Judgment was entered in the Judgment Binder on the 21st of June 2021.

**[5]** On the 6th of April 2022, an acknowledgment of service was filed and a Defence filed on the 18th of August 2022. A notice was issued for a case management conference on the 21st of February 2023. The application to set aside default judgment and affidavit in support was filed on the 25th of October 2022. An affidavit in response sworn to by the Claimant was filed on the 14th of April 2023. Submissions were subsequently filed by the respective parties and the matter was heard on the 15th of June 2023.

**ISSUES**

**[6]** The issues which arise for determination are:

1. Does the Applicant have a realistic prospect of success to justify the setting aside of the judgment in default?

2. Has the Applicant applied to the Court as soon as is reasonably practicable after finding out that judgment has been entered?

3. Has the Applicant given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be?

**LAW AND ANALYSIS**

**[7]** Although the matter was a fairly straightforward one, there were detailed submissions filed on both sides. These submissions have been carefully considered in arriving at my decision and while I do not intend to re-state them in detail, the considerations raised therein have been addressed in the course of my examination of the relevant issues.

**Does the Applicant have a realistic prospect of success to justify the setting aside of the judgment in default?**

**[8]** There is no dispute on the face of the submissions presented by opposing Counsel that the relevant provision which arises for the Court's consideration is found at **Part 13 of the CPR**. While the 1st Defendant/Applicant raised the issue of non-

service, this was not pursued in the body of the application filed as she took no issue with the fact that her Insurers had been filed. Her sole contention is that her Defence raises a triable issue which has a real prospect of success and in the circumstances, she should be allowed the opportunity to have the matter tried.

**[9]** **Rule 13.3** which governs the approach and standard to be applied in matters such as these provides 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.*

**[9]** The importance of the first limb of this rule being satisfied by an Applicant was highlighted by Edwards J (as she then was) in ***Victor Gayle v Jamaica Citrus Growers and Anthony McFarlene*** **2008HCV05707** where she stated:

> *'that in an application to set aside a default judgment entered under part 12 of the CPR, in applying rule 13.3, the primary consideration is whether the defence has any real prospect of success…However in exercising the discretion whether or not to set aside the judgment regularly obtained, the court must also consider the matters set out in rule 13.3(2). (emphasis supplied).*

**[10]** In respect of this requirement, it was submitted on behalf of the Applicant/1st Defendant that it would not be correct to assert that she does not have a real prospect of success. In support of this position, Ms Thompson made reference to paragraph 15 of the Affidavit of Ms Lewis where it was stated that the Claimant caused or contributed significantly to the accident as he had suddenly and without warning overtaken a line of traffic and collided in the right rear door when the 2nd defendant was in an '*advanced stage of turning right*.' Counsel also relied on the dicta of Moore J in ***Smith v Medrington (1997) SC, BVL 103/1995***, where he noted that:

> *'….in considering the exercise of its discretion, the court must determine whether the defendant has merit to which the Court should pay heed, not as a rule of law but a matter of common sense...The Applicant…must do more than show that he has an arguable case…He must, by potentially credible affidavit evidence, demonstrate a real likelihood that he will succeed.'*

**[12]** Ms Thompson also argued that while the Court should not be conducting a mini-trial, the submissions and affidavit of Mr Gillespie contain many assertions that are not evidence and which have not been tested by cross-examination, factors which prove the point that the matter is best left to be tried by the relevant Tribunal.

**[13]** In response to this argument, Mr Sutherland submitted that before a judgment regularly obtained is set aside, sufficient cause for doing so must first be shown and in keeping with the decision of **Evans v *Bartlam [1937] A.C. 473***, there needs to be an affidavit of merit which provides sufficient evidence to persuade the Court that there is indeed a real prospect of success. Reliance was also placed on the judgment of **Nanco, Joseph v Lugg, Anthony and B&J Equipment Rental *Limited [2012] JMSC Civ 81***, in which the value of a default judgment to a Claimant was affirmed as well as the approach which should be taken in examining an application such as this.

**[14]** Mr Sutherland argued that the contents of the affidavit of Ms Lewis fails to satisfy the requirements outlined in these authorities or the extract from Blackstone on which he relied. He asked the Court to note that paragraph 4 of the said affidavit contained conflicting information. Counsel submitted that in one sentence, it was stated that the 2nd defendant indicated his intention to turn right, stopped and proceeded to turn when it was clear to do so and the collision occurred when the Claimant overtook the line of traffic. In another sentence however, the Applicant stated that she felt the impact and it was when she exited the vehicle that she saw the Claimant and motorcycle on the ground.

**[15]** Mr Sutherland described this account as both contradictory and inaccurate. He also asserted that if the Applicant was in the right rear passenger seat, she would not have been in a position to tell if the driver had indicated his intention to turn or

if he had waited until it was clear and safe to do so. Counsel asked the Court to consider whether the Applicant would have been able to see the rear-view mirrors in order to say that the 2nd defendant could have seen the Claimant overtaking. He insisted that if she was, then the mirrors were misaligned and this factor would have to be adversely viewed by the Court.

**[16]** Mr Sutherland made reference to the physical evidence and insisted that if the Claimant had been overtaking the line of traffic, the collision would have been to the right front section of the vehicle and not right rear and the damage was far more consistent with the Claimant's account of the vehicle being turned across his path. He also relied on the police report which stated that the vehicle turned right as it was being overtaken.

**[17]** In order to determine this issue, the draft defence was examined. Paragraph 1 contains an admission of parts of paragraphs 2 to 5 of the Particulars of Claim. It was denied however that the 2nd Defendant was the servant and/or agent of the 1st defendant. It was also denied that there was any negligence on the part of the 2nd defendant and that he had knocked the Claimant from the motorcycle. It was asserted that the collision had occurred after the 2nd defendant had signalled his intention to do so, stopped and waited for it to be safe to proceed and the accident was entirely attributed to the Claimant's negligence.

**[18]** In the well-known case of ***Swain v Hillman and another*** [2001] All ER 91**,** it was stated by the Court that in order to be able to set aside a default judgment regularly obtained, the defendant must have a real prospect 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. It was also outlined that the term '*real prospect of success*' means that the evidence presented should reveal more than a merely arguable case.

**[19]** Applying these legal principles to the evidence before me, it is my considered view that the draft defence filed satisfies this test as a Court could conclude that the

Applicant has raised triable issues as to liability in circumstances where the Claimant was overtaking in an area where it has not been shown that there were broken white lines which allowed for such a manoeuvre at that location. The question as to whether it was safe to make the turn or to overtake is also one which would have to be determined by a Tribunal of fact which would have to assess a number of factors, such as whether there had been any indication of the turn and the position of the Claimant at the time and his ability to see this. It could not however properly be determined on an examination of the section of the vehicle to which damage was done by the impact or on a police report, the maker of which had not been cross-examined. Having arrived at this conclusion, I considered it prudent nonetheless to consider the provisions of **13.3(2) (a)** and **(b)** as the authorities make it clear that these provide relevant considerations for this application.

**Has the Defendant applied to the Court as soon as is reasonably practicable after finding out that judgment has been entered**

**[20]** At Paragraphs 12 and 13 of her affidavit, Ms. Lewis indicated that neither she nor her attorneys were aware that default judgment had been entered and she was only made aware of same through correspondence dated the 25th of August 2022 which was sent to her attorneys by Counsel for the Claimant which made reference to same. She also asserted that she is yet to be served with a copy of same and it was acknowledged by Mr Sutherland that it has not been served. Ms Thompson submitted that based on the authorities cited in her submissions, a delay of two months is not excessive. She described the application for Default Judgment to be set aside as being '*premature*' as it was filed and served in response to written communication that default judgment had been entered, whereas it is the service of the default judgment which would trigger the application.

**[21]** In his submissions, Mr Sutherland contended that the Defendant having delayed two months before attempting to set aside the default judgment cannot now say

that she has approached the Court within a reasonable time and should be held accountable by the Court to provide a good explanation for this period of delay.

**[22]** In examining this limb of **13.3**, I took careful note of the concession by Counsel for the Claimant that the Default Judgment had not been served on the Applicant up to the date of the hearing. The only notice of same was the correspondence sent in August 2022.

**[23]** The importance of an Applicant satisfying the requirements of **Rule 13.3(2)(a)** and **(b)** was acknowledged by Edwards J in the ***Victor Gayle*** decision when she stated as follows:

> *10.Although the primary consideration is the prospect of success, the factors in rule 13.3 (2) are not redundant. The rule states that the court •must consider them and the question remains that having considered them what is to be done about them. Sykes J took the view in the case of Sasha-Gaye Saunders', at paragraph 24, that, in the absence of some explanation for the failure to file a defence or acknowledgment of service, the prospect of succeeding in having the judgment set aside should diminish. Also if the delay is quite gross then that ought to have a negative impact on successfully setting aside the judgment. (emphasis added)*
>
> *11. This approach means that a defendant who has a real prospect of successfully defending the claim may still be shut out of litigation if the court considers the factors in 13.3 (2) against his favour and in going on to consider the overriding objective and any likely prejudice to the accused it comes to the conclusion that the judgment ought not to be set aside. See also the case of Salfraz Hussain v Birmingham City Council, Coral George Coulson, Governors of Small Heath. Grant Maintained School (2005) EWCA Civ 1570 (delivered February 25, 2005) for a discussion on the approach the court ought to take in the case of multiple defendants.*

**[24]** I have examined the timing of this application and although there was this further delay of two months after the Applicant '*gained notice'* of this default judgment, I am of the view that this was not the most egregious situation as in the **Victor Gayle** decision, the Court had set aside the default judgment in circumstances where the application was filed a year after the Applicant became aware of the judgment. In spite of this delay, Edwards J (as she then was) was of the view that this did not by itself outweigh the factors that supported the setting aside of the Judgment.

**Has the Applicant given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be**

**[25]** In addressing **13.3(2)(b)**, Ms Thompson made reference to paragraphs 6 through to 10 of the Applicant's affidavit where she provided an explanation for her failure to file an acknowledgement of service and/or defence. In her explanation, Ms Lewis stated that she was not aware of the claim as service had been done on her insurers and they had not been able to make contact with her until August 2022 and her acknowledgment of service and defence were filed on the 18th of August and served on the 22nd. Ms Thompson asked the Court to find that the explanation was a good one as the Applicant could not have responded to an action that she was not aware of and contact had to be made with her to file her defence and both were filed as soon as contact had been made.

**[26]** In his submissions on this point, Mr Sutherland commended to the Court, the reasoning of Sykes, J (as he then was) in **Sasha Gaye Saunders v Michael Green etal 2005HCV02868** in which he stated:

> *'in the absence of some explanation for the failure to file the acknowledgement of service or the defence, the prospect of successfully setting aside a properly obtained judgment should diminish'.*

**[27]** He referred to the contents of the Applicant's affidavit that she had been informed that she would be provided with legal representation and Dunbar and Co had been retained to do so. Mr Sutherland argued that an acknowledgment of service could have been filed by the Applicant's Attorneys- at- Law on the instructions of her Insurers whether or not the Defendant had been located.

**[28]** In examining this issue, I began with the submission of Ms Thompson that the Applicant could not have filed the relevant documents because she was not aware of the action. While this may have been the case, I agree with Mr Sutherland that this was not in itself a bar to the filing of the relevant documents. This was of particular importance in circumstances where it has not been asserted that the accident had not been reported and as such the Insurance company would not

have been in a position to indicate whether or not the matter was being defended. Additionally, the loss of contact between the Insurer and Insured does not in my view constitute a good explanation for this failure as the onus would have been on the Applicant to update her contact information.

**[29]** In respect of the delay in filing the acknowledgment of service and defence to this claim, while I agree with the submission of Mr Sutherland that this explanation is not the most compelling one given the Applicant's obligations, I adopt the words of Panton JA in ***Strachan v The Gleaner Co Motion* 12/1999** delivered 6th December 1999 where he stated:

> *"Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."*

**POSSIBLE PREJUDICE TO THE CLAIMANT**

**[30]** I also considered whether the Applicant's inaction for the 2-month period occasioned any prejudice to the Respondent/Claimant. In submissions on this point, Ms Thompson argued that the Claimant has failed to prove that any prejudice would be suffered as he would still have the opportunity to present his case and have it ventilated before the Court whereas the Applicant would be greatly prejudiced if she is not allowed to have her defence stand and a determination of the matter on its merits. In submissions on this point, Mr Sutherland argued that the prejudice to the Claimant would outweigh that to the Defendant. He also asserted that the Claimant would lose a benefit in being deprived of this judgment but did not outline any particular prejudice that would be occasioned to him.

**[31]** Upon examination of this issue, while I recognize that a default judgment is a thing of value which the Court should be loathe to remove from a Claimant's grasp without good reason, I was not able to identify a specific hardship that the Claimant would actually encounter if the judgment were to be set aside. The claim would still exist and costs could be ordered to compensate for this setback. Additionally, the

new dispensation has created a fast-track court which would also allow for a trial to occur within a maximum of two years. On the other hand, the Applicant is faced with the strong possibility of damages being assessed against her in a substantial sum as well as interest and costs if the judgment is allowed to stand. In light of the foregoing, it is my conclusion that there is a greater chance of prejudice being suffered by the Applicant than there would be to the Respondent herein.

**OVERRIDING OBJECTIVE**

**[32]** While Counsel for the parties did not specifically address the Court on the importance and relevance of the overriding objectives in this matter, I gave careful consideration to same in arriving at my decision, specifically the requirement that justice be done between the parties. Having conducted this examination, I am satisfied that this is an appropriate case for the default judgment to be set aside as the defence which has been raised reveals that the Applicant has a real prospect of success if the matter were to proceed to trial. In these circumstances, I am persuaded that in spite of the slight delay in bringing this application, the overriding objective weighs heavily in favour of this application being granted.

**CONCLUSION**

**[33]** Accordingly, it is my ruling that:

1. The Default Judgment entered herein against the 1st Defendant is set aside.
2. The 1st Defendant's Defence filed August 18, 2022 and served on August 22, 2022 is permitted to stand.
3. The 1st Defendant's Acknowledgement of Service filed on August 18th 2022 and served on August 22th , 2022 is permitted to stand.
4. Costs awarded to the Claimant to be taxed if not agreed.
5. Applicant's Attorney to prepare, file and serve the Formal Order herein.