[2022] JMSC Civ 142

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2020CV02538

BETWEEN	**KADINE GREEN**	**CLAIMANT**
AND	**UNICOMER (JAMAICA) LIMITED**	**DEFENDANT**

Miss Kacey-Ann Nelson instructed by Nelson Law for the claimant.

Mr Joerio Scott instructed by Samuda & Johnson for the defendant.

Heard June 2, 2022, June 21, 2022 and July 26, 2022

Setting Aside Default Judgment – CPR 13.2 – Whether the claim form and particulars of claim were served – Whether the provisions of section 387 of the Companies Act is mandatory - CPR 13.3 – Whether the defence is one with a real prospect of success - Whether the affidavit in support of the application is an affidavit of merit- Whether service of the default judgment was irregular

CORAM: JARRETT, J (Ag)

Introduction

[1] On March 20, 2020, the claimant was a visitor in of one of the defendant's establishments located in Mandeville in Manchester. While there she suffered injuries when a metal object fell from a wall and hit her on the shoulder. She filed a claim against the defendant, seeking damages for negligence and/or under the provisions of the Occupiers Liability Act. Judgment in default of acknowledgment of service was entered against the defendant on September 7, 2020. This is the defendant's application to set aside that default judgment. It is supported by an

affidavit of Chad Lawrence who depones that he is an attorney-at-law employed to Johnson & Samuda, the attorneys-at-law for the defendant.

[2] The notice of application asks that the judgment be set aside for "irregularity", or in the alternative, pursuant to CPR 13. It also asks that the defendant's amended acknowledgement of service and amended defence filed on April 21, 2021, be both permitted to stand. The grounds on which the defendant relies are that the default judgment was irregularly obtained, it has a defence with a real prospect of success and, it would be prejudiced if the application is not granted. It also generally relies on the overriding objective of the CPR.

[3] Exhibited to the affidavit of Chad Lawrence is an affidavit of service by electronic mail which gives evidence of the service of the amended acknowledgement of service and the amended defence. According to counsel for the defendant Mr Joerio Scott, the draft defence to the claim which the defendant relies on in this application, is the amended defence which is exhibited to the affidavit of service by electronic mail, sworn by Carol Arrindell, a paralegal at Samuda & Johnson. That defence is not signed by the defendant but by the defendant's attorneys-at-law.

[4] It is useful to briefly set out the claimant's claim in order to put the defendant's application into context. The claimant alleges that she visited the defendant's Mandeville premises on March 20, 2020, at approximately 12.20pm to conduct business. While she was seated and waiting to be attended to, a metal object fell from the wall and hit her. She claims that the defendant was negligent in failing to provide adequate measures to protect her safety; failed to properly affix ornaments onto the wall thereby causing them to fall and injure her; failing to check that its ornaments were properly affixed to the wall; exposing her to unnecessary risk of danger; and failing to notify her by signage or otherwise of ornaments falling from the wall. She alleges that she suffered injuries to her shoulder, and she relies on the medical report of Dr Alicia Sway-Spencer.

The evidence

[5] In his affidavit, Chad Lawrence says that he was advised by the defendant of the following: -

a) It indicated to the claimant that it was not accepting liability as the alleged incident was caused by her own negligence and that of a third party who caused a piece of artwork to fall from the wall and who negligently replaced it;

b) Around mid-December 2020, a gentleman left a sealed envelope at its Mandeville branch which was received by an employee in the ordinary way that mail is received by them. The gentleman did not disclose that the documents were court documents and so the employee who received the documents and opened the envelope did not appreciate what they were and therefore did not treat with them appropriately.

c) It sent the documents to its insurers who then sent them to Samuda & Johnson, attorneys-at-law

[6] He says further that Samuda & Johnson filed an acknowledgement of service and a defence on March 8, 2021, and an amended acknowledgement of service and an amended defence on April 21, 2021. The amended documents were served by electronic mail on the claimant's attorney-at-law on April 21, 2021.

[7] Chad Lawrence's affidavit goes on to say that the amended defence was prepared by Samuda & Johnson based on instructions received from the defendant. He further states that the defendant alleges that the claimant was herself negligent and will rely on the following particulars of negligence: -

a) Sitting or remaining seated in the chair when she knew that a piece of artwork which was immediately above the seat had previously fallen.

b) Failing to heed the warning given that where she sat, given the circumstances, was unsafe.
c) Failing to take any or any special care of her own safety
d) Failing to realise that the piece of artwork which had fallen was thereafter improperly and dangerously replaced on the wall by a third party.
e) Failing to take any proper steps to avoid the accident.

[8] As to the allegations against a third party, Chad Lawrence says that he has been advised by the defendant that the circumstances surrounding the alleged incident was as a result of the negligence of a third party. The particulars of negligence are as follows: -

a) Causing the piece of artwork to fall by allowing his back to touch same.
b) Causing the said artwork to be replaced improperly on the wall that it created a risk or danger to visitors of the premises.
c) Failing to see that the replaced artwork was precariously hung by him on the wall.
d) Failing to give or to give any proper warning to the claimant and visitors of the imminent risk or danger
e) Failing to take any or any proper measures to prevent the accident.

[9] Based on information gleaned from the court's records and Samuda & Johnson's files, Chad Lawrence says he determined that judgment in default had been entered. But he says it was entered in July 2021 and that by that time the defendant had filed its amended acknowledgment of service and amended defence. The default judgment, he says, was therefore irregularly obtained and should be set aside. As to the place of service, he states that the claim form and accompanying documents were served at the defendant's Mandeville Branch. Yet, he says, the default judgment and notice of assessment of damages were served at the

defendant's St Andrew office at a time when the claimant's attorney was aware that Samuda & Johnson was on the record for the defendants. The consequence of that, he says, is that service of the default judgment is irregular. In concluding his affidavit, he asks that the default judgment be set aside as the defendant's defence is "viable", the judgment was irregularly obtained and its service irregular.

Counsel's submissions

[10] Mr Joerio Scott, Counsel for the defendant focused his submissions on Chad Lawrence's affidavit. He argued that the default judgment was irregularly obtained as it was entered in July 2021 and the amended defence was filed on April 21, 2021. When I pointed out to him that the default judgment was in fact entered on September 7, 2020, he was quick to abandon that line of argument. He then turned his attention to the defence. According to him the defendant's defence as reflected in the amended defence, has a real prospect of success. The defendant contends that the claimant was herself negligent in that she sat where she knew that the piece of artwork immediately above her head had previously fallen and that a third party had improperly and dangerously replaced it. The third party who was responsible for the artwork falling was also negligent for the reasons outlined by Chad Lawrence in his affidavit. The defence raises triable issues, argued Mr Scott, as to who had a duty of care and whether that duty was discharged.

[11] On my invitation to address the question whether service of the claim form was proper service, counsel Mr Scott submitted that it was not. He relied on section 387 of the Companies Act and said that service ought to have been on the registered office of the defendant which he said is not its Mandeville branch.

[12] Miss Nelson, counsel for the claimant argued that the claim form and the particulars of claim were served at the defendant's Mandeville branch and that there is an affidavit of service of Shane Webster which speaks to the fact that the documents were accepted by the manager. She submitted that the provisions of CPR 5.7(d) were therefore satisfied. Turning to the affidavit of Chad Lawrence, counsel said that his evidence is hearsay evidence and that there is no proper draft

defence exhibited to it for me to consider. Reliance was placed on the decision in **Joseph Nanco v Anthony Lugg and B & J Equipment Rental Limited [2012] JMSC Civil 81**. She said that the defence relied upon by the defendant is part of an exhibit of another affidavit sworn to by Carol Arrindell, a paralegal employed to Johnson & Samuda, which is itself an exhibit relied upon by Chad Lawrence. Miss Nelson argued that if the defendant intended to rely on that defence, there should have been affidavit in these proceedings filed by Carol Arrindell herself in which she exhibits the proposed defence.

[13] In her criticism of the proposed defence, Miss Nelson said that: -

a) It was an unreasonable expectation to say that the claimant knew that the artwork that fell on her had previously fallen, as there is nothing in the proposed defence to say that there was anything to alert her to the danger and that she acted contrary to the warning. Further there is nothing in the proposed defence to say that the claimant was there when the artwork previously fell.
b) There is nothing to indicate who gave the claimant the warning. She said there should be evidence from the person who gave the warning to support the defendant's case that a warning was given and not adhered to.
c) The evidence of Chad Lawrence is hearsay evidence and a proper affidavit ought to have been filed giving direct evidence. The defendant should therefore not be allowed to rely on it.
d) As the occupier, the duty is that of the defendant to ensure that everything placed on its walls is safe. It cannot be that the responsibility to do that is being placed on the claimant.
e) No ancillary claim has been filed in relation to any third party, besides the particulars of negligence of a third party has not even named this third party.

Miss Nelson said the defence is fanciful. She relied in support of her submission on the decisions in **Victor Gayle v Jamaica Citrus Growers & Others, decided April 4, 2011** and **Marcia Jarrett v Southern Regional Health Authority and the Attorney General, decided November 3, 2006**.

Analysis and discussion

Although not expressly stated in its application, it seems to me that the defendant seeks to set aside the default judgment under CPR 13.2 or alternatively under CPR13.3. To argue on an application to set aside default judgment that the judgment was irregularly obtained because service of the claim form was not properly effected, is to argue that the judgment must be set aside as of right under CPR 13.2. The alternative argument being made by the defendant is that in any event, it has a defence with a real prospect of success and therefore pursuant to CPR 13.3, it seeks to have the default judgment aside. I must therefore first decide whether the claim form was properly served. If it was not, then I must set aside the default judgment. If, however, I find that there was proper service of the claim form, CPR13.3 requires that I decide whether the defendant has a defence with a real prospect of success. A defence with a real prospect of success is not fanciful, it makes good sense and it has conviction (**International Finance Corporation v Utexafrica S.P.R.L [2001] EWHC 508; Swain v Hillman and Another [2001] All ER 91**; and **Sasha-Gaye Saunders v Michael Green and Others Claim No 2005HCV2868, delivered February 27, 2007**). I would also add that it should be sound in law. If I find that the defence has no such prospects, I need not take the analysis any further. (**June Chung v Shanique Cunningham [2017] Civ 22).**

Was there proper service of the claim form?

[14] The defendant is a limited company. By virtue of CPR 5.7, service of a claim form may be by any of the following means:

a) by sending the claim form by telex, FAX, prepaid registered post, courier delivery or cable addressed to the registered office of the company;

b) by leaving the claim form at the registered office of the company;
c) by serving the claim personally on any director, officer, receiver, receiver manager or liquidator of the company;
d) by serving the claim form personally on an officer or manager of the company at any place or business of the company which has a real connection with the claim; or
e) in any other way allowed by an enactment.

The affidavit of service sworn by Shane Webster on September 3, 2020, and filed on September 7, 2020 states that he served the claim form, on Ms Veronica Brown on August 19, 2020 at the defendant's Mandeville Branch and at the time of service she identified herself as the Branch Manager.

[15] Section 387 of the Companies Act says that a document may be served on a Company by leaving it at or sending it by post to the registered office. The Companies Act is obviously primary legislation which supersedes the CPR should there be an inconsistency between the two. But there is no inconsistency here. Section 387 of the Companies Act is not mandatory. It does not stipulate that the only way to serve process on a company is by leaving the documents at its registered address. The provisions of CPR 5.7 outline all the means by which a limited company like the defendant, may be served with a claim form. In this case the affidavit evidence of Shane Webster is that the person at the defendant's Mandeville branch on whom he served the claim form and accompanying documents was the Manager for the branch, Ms Veronica Brown. The Mandeville branch is a place of business of the defendant with a real connection with the claim. The incident the subject of the claim took place at the defendant's Mandeville branch. CPR 5.7 (d) has been satisfied. I therefore find that the claim form was properly served. Furthermore, the defendant filed an acknowledgment of service on March 8, 2021, and an amended acknowledgment of service on April 21, 2021. In both documents the defendant inserted the date it was served with the claim form and the particulars of claim. Therefore, even if there was a defect in the

service of these documents, the filing by the defendant of an acknowledgment of service without seeking to challenge the jurisdiction of the court under CPR 9.6, would have operated to waive any irregularity. (**B& J Equipment Rental Limited v Joseph Nanco [2013] JMCA Civ 2** per Morrison P)**.**

Service of the default judgment

[16] Before dealing with the defence, I will briefly address the submissions by counsel for the defendant, that the service of the default judgment was irregular. He argues that service ought to have been on Samuda & Johnson, but instead it was effected on the defendant at its registered offices in St. Andrew. CPR 5.6 provides that where an attorney-at-law is authorised to accept service of a claim form or has notified the claimant that he is so authorised, service must be on that attorney-at-law. There is no similar provision relating to the service of documents other than the claim form. CPR 6.2 says that where the rules require service of a document other than a claim form, it may be served by any of the means of service in Part 5. CPR 5.7 (d) is a part of Part 5. In the face of these provisions of the CPR, I reject Mr Scott's submission that service of the default judgment was irregular.

Does the defence have a real prospect of success?

[16] Among the defences available to an occupier in a claim brought in negligence and under the Occupiers Liability Act (the Act) is *volenti non fit injuria*. In other words, the defendant can say that the claimant willingly placed herself in a place where there was the risk of injury. Put another way, she assumed the particular risk. Section 3(7) of the Act provides that: -

> **"**The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor."

Under the law of negligence, for the defence to succeed, a defendant must show that the claimant by words or conduct impliedly agreed to absolve the defendant from liability. A good example of the operation of the defence is the English Court

of Appeal decision in **Morris v Murray and Another [1991] 2 QB 4.** In that case**,** the plaintiff took a flight on an aircraft operated by a pilot whom he knew to be inebriated. In fact, both of them had been drinking extensively before they boarded the aircraft. After take-off, the aircraft crashed, the pilot died and the plaintiff seriously injured. He sued the pilot's estate for damages in negligence and the estate raised the defence of *volenti not fit injuria*. On appeal from the decision of the first instance judge who found for the estate, the court of appeal held that the claimant in taking the flight in full knowledge that the pilot was drunk, the dangers in doing so being obvious, assumed the risk of injury and thereby absolved the pilot from any liability for negligence.

[17] A warning of the risk of injury may also be a valid defence. But section 3(5) of the Act states that:

> "Where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability unless in all the circumstances it was enough to make the person reasonably safe"

Chad Lawrence's affidavit suggests that the defendant proposes to rely on both these defences if its application to set aside the default judgment is successful. However, in relation to the defence of *volenti non fit injuria*, there is nothing in his affidavit which indicates why the defendant alleges that the claimant knew that a piece of artwork had earlier fallen from the wall above the seat in which she sat; that she knew that sitting in that seat posed a risk of danger to her; and that she voluntarily took that risk. The affidavit also does not state the basis on which the defendant contends that the claimant ought to have realised that the artwork was "dangerously "and "precariously" replaced on the wall by a third party. Where a defendant is seeking to set aside a default judgment on the basis that it has a defence with a real prospect of success, the evidence in support of that application must be sufficient to demonstrate a good defence in law. McDonald Bishop J (as she then was) underscored this point in **Joseph Nanco v Anthony Lugg and B**

& J Equipment Rental Limited [2012] JMSC Civil 81. It is not enough for a defendant on such an application to merely include in the affidavit in support, all the known defences to a tort, without going further and provide adequate evidence to support the applicability to the case it wishes to advance, of each defence it raises. I find that Chad Lawrence's affidavit has failed to do that in relation to the defence of *volenti non fit injuria*. As to the defence that the claimant was warned, I also find that the evidence is equally lacking. There is nothing in the affidavit that demonstrates that the defendant had issued or provided any warning to the claimant. The duty to provide adequate warning is that of the occupier. Furthermore, there is no evidence given by Chad Lawrence of the kind of warning that the claimant is alleged to have had, when it was given and who gave it.

[18] To say that the accident was caused by a third party cannot without more, absolve the defendant from liability. The duty to keep the premises safe is that of the defendant. Even if the unnamed third party caused the artwork to fall from the wall by virtue of his back coming into contact with it, the defendant had a duty to its invitees to ensure that its artwork was positioned in such a way to prevent this type of incident occurring. Besides, it was the duty of the defendant to take corrective measures immediately to deal with any such an occurrence, rather than allow the third party to replace the artwork on the wall "precariously" and "dangerously" as alleged. Moreover, not naming the third party only adds to the lack of sufficiency of the evidence of the defendant. I find in the circumstances, that the evidence to support the defence that the accident was caused by a third party is deficient and inadequate and also fails to meet the test of CPR 13. 3.

[19] The affidavit of Chad Lawrence also suggests that the defendant contends that the claimant failed to take care for her own safety. The allegation being, that in failing to heed the warning given and in voluntarily taking the risk that sitting in the seat posed, she was negligent. Nothing more by way of evidence has been offered to support this allegation. Since I find, for the reasons given above, that the evidence in support of the defences of *volenti non fit injuria* and the existence of a warning are deficient, it follows that I also find that the evidence in relation to negligence is

equally deficient. I agree with Miss Nelson's criticism of the proposed defence. It is not a defence with a real prospect of success.

Is the affidavit of Chad Lawrence an affidavit of merit?

[20] CPR 13.4 requires that an application to set aside a default judgment under section 13.3 must be supported by affidavit evidence and exhibited to that affidavit must be a draft defence. Who is an appropriate affiant for such an affidavit, and whether hearsay evidence is admissible evidence for an application to set aside default judgment under section 13.3 were addressed by McDonald Bishop J (as she then was) in **Joseph Nanco v Anthony Lugg and B & J Equipment Rental Limited [2012] JMSC Civil 81,** and later by the court of appeal on an appeal from that decision in **B& J Equipment Rental Limited v Joseph Nanco [2013] JMCA Civ 2.**

[21] Morrison P in the court of appeal decision said that a defendant applying to set aside a default judgment must generally produce an affidavit with evidence based on personal knowledge or information and belief from someone who is able to positively swear to the facts upon which the defendant intends to rely in defence of the claim. Chad Lawrence as an attorney-at-law in the firm representing the defendant, cannot positively swear to the facts upon which the defendant relies to defend the claim. All the evidence he gives in relation to the proposed defence is hearsay. In my view he is not an appropriate affiant to swear the affidavit in support of the defendant's application I therefore do not find that the evidence before the court in relation to the defendant's draft defence is an affidavit of merit sufficient to ground the application to set aside the default judgment pursuant to CPR 13.3. What is more, the draft defence, is an exhibit to another affidavit which Chad Lawrence did not swear but which is itself an exhibit to his own affidavit.

[22] The overriding objective of the CPR requires that I deal with cases justly. It would not be just in my view to set aside the default judgment on the basis of the hearsay evidence of Chad Lawrence who cannot swear positively to the facts on which the

defendant relies for its defence; and on the basis in any event, of a defence, which does not have a real prospect of success. I will not grant the defendant's application.

Orders: -

[23] In the result, I make the following orders: -

a) The defendant's application to set aside the default judgment is refused.
b) Costs to the claimant to be agreed or taxed.
c) Leave to appeal granted.