



[2014] JMSC Civ. 50

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

CLAIM NO. HCV 2012 05608

BETWEEN	BRENTON HENNIE	CLAIMANT
A N D	JAMAICA PRE-MIX CONCRETE LTD.	DEFENDANT

Mr. Jason Jones instructed by Nigel Jones & Company for the Claimant.

Mrs. Symone M. Mayhew for the Defendant.

Heard: February 5, 2014 and April 11, 2014.

McDonald, J.

[1] The Defendant by way of Notice filed on September 10, 2013 seeks the following orders: (1) that the judgment in default of defence entered on the 27th February 2013 be set aside (2) Costs of the application to the Defendant to be agreed or taxed. The grounds on which the applicant seeks the orders are as follows:-

- (a) Pursuant to Rule 13.2 of Civil Procedure Rules, the Court must set aside any judgment entered under Part 12 if the judgment was wrongly entered.
- (b) All of the conditions of Rule 12.5 for the entry of a judgment in default of defence were not satisfied.
- (c) The judgment was wrongly entered as the Applicant/Defendant filed a Defence to the claim on November 22, 2012.
- (d) It is just that in the circumstances the Claimant should pay the costs of the application.

Chronology of Events:

[2] Claim Form and Particulars of Claim were filed on the 12th October 2012 in the name of Brenton Hennie – Claimant and Jamaica Pre-Mix Ltd. – Defendant – (Suit No. 2012 HCV 05608).

- Defendant's Acknowledgement of Service was filed on 2nd November 2012 in the name Brenton Hennie – claimant and Jamaica Pre-Mix Concrete Limited – Defendant – (paragraph 5 of the Acknowledgement states that proper name was not stated on Claim Form and full name of Defendant was Jamaica Pre-Mix Concrete Limited).
- Defence was filed on 22nd November 2012 in the name of Brenton Hennie – Claimant and Jamaica Pre-Mix Concrete Limited – Defendant (in Suit 2012 HCV 04683)

It was served on the Claimant's attorneys Everton Dewar & Co. on 26th November, 2012

- Notice of Change of Attorney was filed on 4th January 2013 by Nigel Jones & Co.
- Amended Particulars of Claim were filed on 4th January 2013.
- Defendant's Acknowledgement of Service was filed on 16th January 2013.
- Request for Judgment in Default of Defence was filed 27th February 2013 and Interlocutory Judgment in Default of Defence entered on 16th July, 2013.

Defendant Applicant's Case

[3] It is the Defendant's case that the Default Judgment was entered wrongly, as a defence was filed in response to the claim within the time required by the Civil Procedure Rules. No amended defence was necessary and so one was not filed. The Applicant contends that a Defendant served with an Amended Claim form "may" not "must" file an Amended Defence (Rule 20.4 of CPR).

[4] Mrs. Mayhew submitted that the Acknowledgment of Service filed on 2nd November 2012 indicated that the Defendant's proper name was Jamaica Pre-Mix Concrete Ltd. and the law is quite clear that when a party is misnamed, the

Court will look at all the circumstances and the deciding factor will be the question of who the party intended to sue. She relied on the case of **Elita Flickinger (widow of the deceased Robert Flickinger) v. David Preble (t/a Xtabi Resort Club and Cottages) and Anor.** unreported Suit No. CLF013 of 1997 delivered January 31, 2005 by Justice Sykes and **Gregson v. Channel Four Television Case Reference (2002) EWCA Civ. 941** in support of this contention.

- [5] She reiterated that the defence was not only filed but was also served on the Claimant's attorney-at-law. Furthermore upon a review of the Claim Form and Particulars of Claim, it is beyond doubt that the intended defendant was the Claimant's employer, given the claim was for damages for alleged negligence by the employer/breach of duty of care as an employer. Jamaica Pre-Mix Concrete Limited who obviously received the Claim Form as confirmed by the Acknowledgement of Service was obliged to respond to the claim. They were the employer. Not only did the Jamaica Pre-Mix Concrete accept service notwithstanding the misnaming, it also pointed out and corrected the error in its name in the Acknowledgement of Service. This was not therefore, a case of misidentification but misnaming.
- [6] In relation to the Claimant's contention that the appearance of an incorrect suit on the Defence is also evidence that no defence was filed in this claim, Mrs. Mayhew submitted that this is devoid of merit, unfortunate and overly technical. She asserted that the Claimant's attorney was served with and acknowledged service of the Defence dated 22nd November 2012. Upon a perusal of the Defence there can be no doubt that the Defence was the Defence of Jamaica Pre-Mix Concrete Limited to this claim. It expressly states this and traverses the very claim brought by the Claimant paragraph by paragraph.
- [7] She further submitted that this was a mere typographical error, a procedural irregularity which does not invalidate the filing of the defence. She referred the Court to Rule 26.9 of the CPR and the case of **Ase Metals MV v. Exclusive Holidays of Elegance Limited (2013) JMCA Civ. 37.** She submitted that in the

absence of a sanction setting out consequence for incorrectly stating the wrong claim number on a statement of case or other document, this irregularity is one that can be cured by the court pursuant to Rule 26.9 of the CPR.

Claimant' Case

- [8] It is the Claimant's case that the Judgment in default of defence was regularly entered. The Claimant sued Jamaica Pre-Mix Ltd and the Defendant changed the name of the Defendant who was sued to Jamaica Pre-Mix Concrete Limited (which is a separate company) and filed a Defence on behalf of Jamaica Pre-Mix Concrete Limited. Mr. Jones submitted that the Civil Procedure Rules do not allow the Defendant to change the Defendant sued and replace it with another company. As a result, the Defence filed on 22nd November 2012 was defective (null and void) and not properly before the court. A defence was required within 42 days after Jamaica Pre-Mix Concrete Limited became a party to the proceedings on 4th January 2013 and the Defendant filed no such defence. He said that the Defendant failed to file a defence within time to the claim at hand as required by Rule 12.5 (c) and (d) and as such the Judgment entered was regular.
- [9] He submitted that the Defendant has not proven that the Registrar erred because there was no defence to this claim before the Registrar. The Defendant cannot file a defence with an incorrect claim number and a different Defendant (two important things in a claim) acknowledged that they made an error and then state the Registrar was wrong to enter judgment. Mr. Jones opined that the correct thing for the Defendant to have done was to advise the Claimant of the error and then the Claimant would make the necessary amendments. The Defendant could also have made an application for summary judgment and/or to strike out the Claimant's claim in the basis that the Claimant has no real prospect of success.
- [10] Reference was made to Rule 19.2 (1) CPR – which states- "The Claimant may add a new defendant to proceedings without permission at any time before the Case Management Conference." Mr. Jones submitted that if the Defendant

could add a new Defendant to the proceedings without permission the rules must specifically state this. He submitted that the Rules also do not allow a Defendant to add another Defendant and it is also not allowed to substitute the Defendant named in the claim to another defendant without permission from the court. He said that the defence of Jamaica Pre-Mix Concrete Limited is not properly before this Court because they became a party to the proceedings in circumstances where the Defendant has no such power to make them a party.

[11] He said there was not a claim before the court against Jamaica Pre-Mix Concrete Limited at the time the defence was filed and the attorney for the Defendant did not have the power to change the name of the Defendant to another company. He submitted that the Defendant cannot change the Defendant which the Claimant sued. The CPR does not allow for that and any change must render the defence null and void. If it is that Jamaica Pre-Mix Concrete Limited was served with the claim (which the claimants' deny) they were not a party to the proceedings and could not automatically add themselves as a defendant. Rule 19.3 CPR states "the court may add, substitute or remove a party on or without an application." Rule 19.3 (2) states that "an application for permission to add, substitute or remove a party may be made by an existing party or a person who wishes to become a party." Mr. Jones submitted that even if there was a misnaming or misidentification of the Defendant by the Claimant, the Defendant erroneously changed the Defendant to another entity as such, the Defence filed was not properly before the court.

[12] Mr. Jones submitted that the Defendant's attorney failed to file a defence on behalf of Jamaica Pre-Mix Concrete Limited within 42 days after being served with the amended claim (at which time Jamaica Pre-Mix Concrete Limited properly became a party to the proceedings). Furthermore the claim number on the Defence had a different claim number from the Claim Form. He also asserted that the Claimant's attorney have no instructions as to whether Mr. Hennie had a separate claim against Jamaica Pre-Mix Concrete Limited with the claim number stated in that document. He asserted that Jamaica Pre-Mix

Limited and Jamaica Pre-Mix Concrete Limited are two separate companies both active at the material time. He exhibits a letter from the Registrar of Companies speaking to their incorporation and status.

- [13] The claimant's attorney also submitted that a judgment in default is a serious and valuable possession and the claimant should not be deprived of his judgment unless all relevant formalities are adhered to. Mr. Jones said that the formalities in this case were not complied with. The claim number was different and the Defendant changed the name of the Defendant sued to a different company. He said the defendant has not presented any case that state that a Defendant can change the named company which the Claimant sued to another company and file a Defence on behalf of the new company in the same suit. He submitted that this has not been done, because there is no such case and the Defendant does not have the power to do so. He said that even if there was a misnaming or misidentification of the Defendant by the Claimant, the Defendant erroneously changed the Defendant to another entity and as such the Defence filed was not properly before the court. He said the Defendant does not have the power to change the named Defendant to another Defendant (which is a separate company)

The Law and Analysis

- [14] Rule 13.2 Civil Procedure Rules state that the Court must set aside a judgment entered under Part 12 if the judgment was wrongly entered because:-

(b) in the case of judgment for failure to defend, any of the conditions in Rule 12.5 was not satisfied. The relevant section of Rule 12.5 reads:-

"the registry must enter judgment at the request of the claimant against a defendant for failure to defend if....

(d) that defendant has not –

(i) filed a defence within time to the claim or any part of it (or such defence has been struck out or is deemed to have been struck out under rule 22.2 (6))

[15] I have carefully examined the oral and written submissions of both Counsel in the matter. I find that there was a misnaming of the defendant by the claimant and not a misidentification. Paragraph 5 of the Acknowledgement of Service filed on 2nd November 2012 pointed out that the defendant's name was not properly stated and that the defendant's correct name was Jamaica Pre-Mix Concrete Limited. The claim brought by the claimant against Jamaica Pre-Mix Ltd. was for damages for alleged negligence by the employer/breach of duty of care as an employer. It is clear from the Claim Form and Particulars of Claim that the real defendant Jamaica Pre-Mix Concrete Ltd is the one who was intended to be sued, because they were the employer of the Claimant. They would have been obliged to respond to the claim. They obviously received the Claim Form as confirmed by the Acknowledgement of Service. Not only did the Jamaica Pre-Mix Concert Ltd accept service notwithstanding the misnaming, it also pointed out and corrected the error in its name in the Acknowledgement of Service.

[16] In the case of **Elita Flickinger (widow of the deceased Robert Flickinger) v. David Preble t/a Xtabi Resort Club & Cottages and Anor** (supra) Sykes J dealt with the issue of when a party is misnamed. A paragraph 19 he said:-

"Often times, whether because of carelessness otherwise, errors are made when the claimant is seeking to identify and name the correct defendant. The risk of error is perhaps greater when one is suing a company. Sometimes the wrong tortfeasor is sued. At other times, the correct tortfeasor is sued but is given a wrong name. The wrong name may be a case of misspelling or it may be much more serious such as giving the defendant the name of an existing person, the situation closely resembles one in which the wrong defendant is identified. Outwardly, both are the same. It will often be a close call to decide which it is. This is why a clear comprehensive account setting out how the error occurred is important. The

problem is accentuated if the defendant, as here challenges the application to correct the name on the basis that the application is not a correction of a name but, in reality is an application to substitute a new party for an existing one. What then are the courts to do? The Courts have sought to resolve the issue by what I consider to be the most intelligible and sensible way. The courts ask, "who did the claimant intend to sue?" In answering the question, the courts look at all the circumstances of the case."

- [17] In Flickinger the court was concerned with the application to correct the name of a party after the claim had become statute barred. I find that the principles are applicable to these circumstances. Sykes J noted that there had to be a determination whether it was a case of misidentification or one of misnaming. At paragraph 31 he said:-

"It is still important today to determine which type of mistake is under consideration in order to determine whether the application falls under Rule 19.4 (3) (a) or Rule 20.6 (2) of the CPR (Jam) Different considerations apply to each rule. The Lord Justice said that the key is to find the intention of the party making the mistake. The next question is "what do you look at to determine the intention of the person making the mistake?" Accordingly to Lloyd LJ in the Sardinia Suicis (1991) 1 Lloyds Rep 201, 207 you look at how the claimant described the intended defendant. I would add that you look also at the particulars of claim to see what is being alleged in order to get a better understanding of the claimant's intention. This is important because as I shall show later on, in the case before me, the particulars of the Statement of Claim put it beyond doubt that the Claimant was targeting the operators of the hotel at the time of her husband's death."

- [18] I find that when the Defendant filed its defence on 22nd November, 2012 it did not substitute a new entity. The held acknowledgment of service was in effect accepting that the Defendant was misnamed, and that the Defendant was in fact the Claimant's employer. In ascertaining who the Claimant intended to sue, the

Court must look at the particulars of claim and allegations. The Claimant was alleging in the particulars of claim that Jamaica Pre-Mix Concrete Limited was the tortfeasor and the employer of the Claimant.

[19] I find that from 2nd November, 2012 when the Acknowledgment of Service was filed the Defendant Pre-Mix Concrete Limited, employer, tortfeasor was saying I am the correct employer and the Claimant is claiming against the employer/tortfeasor. The Claimant was well aware that there was a misnaming of the Defendant despite the wrong suit number on the defence. So although there was a wrong suit number on the defence which was filed before the amendments, the substance of the defence is that the Claimant was properly advised since November 2012 both of the substance of the defence and the proper name of the employer/tortfeasor. The defence was filed by the correct defendant/tortfeasor. The then Claimant's Attorney's accepted service of the Acknowledgment of Service and the defence.

[20] I find that the judgment in default of defence was entered on a technicality ignoring the substance of the Claimant's particulars and the substance of the defence filed. The Claimant should at all times have been well aware that his employer was Jamaica Pre-Mix Concrete Limited and the tortfeasor against him and the only entity that he could look to for redress.

[21] I treat the Acknowledgement of Service to the Amended Claim Form and Particulars of Claim as a formality, and as regularizing the Defendant's existence in the suit.

I accept Mrs. Mayhew's submissions that the Defendant's having responded to the claim by the Defence of November 22, 2012.

Jamaica Pre-Mix Concrete Limited was not required to file an amended defence when the Amended Claim Form and amended Particulars of Claim were filed and served because a Defendant served with an Amended Claim Form "may" not

"must" file an Amended Defence. The authority for this is Rule 20.3(1) which reads:-

"A Defendant served with an Amended Particulars of Claim or a Claimant served with an Amended Counterclaim may amend the defence once without written permission within 42 days of service of the Amended Particulars of Claim or Counterclaim as the case may be."

I find that the Defendant can properly rely on Rule 20.3(1).

[22] I do not find that the appearance of an incorrect suit on the defence is evidence that no defence was filed in this claim. The Civil Procedure Rules do not set out any consequences for incorrectly stating the wrong claim number on a Statement of Case or other document. In practice the consequence is that the document would be misfiled. I find that in the absence of a sanction, this irregularity is one that can be cured by the Court pursuant to Rule 26.9 and should not deprive the Defendant of the opportunity to have the judgment set aside pursuant to Rule 13.2 given at the time of the application for a default judgment, Rule 12.5 was not satisfied, as a defence was filed by the Defendant Jamaica Pre-Mix Concrete Limited. Pursuant to Rule 26.9 defence filed with incorrect Suit number 2012 HCV 04683 is amended to read Suit number 2012 HCV 05608. In conclusion I find that a judgment should not have been entered. Judgment in default entered herein on the 27th day of February, 2013 is set aside. No order as to costs.

