[2019] JMSC Civ 248

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2014HCV04438

BETWEEN	**ERRALDO HENRY**	**CLAIMANT**
AND	**ALPHANSO CLARKE**	**1ST DEFENDANT**
AND	**SAMUEL TAYLOR**	**2ND DEFENDANT**

Appearances: Mr. Miguel Palmer for the Applicant. Ms. Angelique Brown and Ms. Christina Beckford instructed by Kinghorn and Kinghorn for the Respondent/Claimant.

Written submissions filed by Mr. Miguel Palmer for the Applicant, and Ms. Angelique Brown instructed by Kinghorn and Kinghorn for the Respondent/Claimant.

Heard December 3 and 18, 2019

Civil Procedure – Application by insurance company to set aside order for service by a specified method and application to set default judgment aside – Unsigned and unsealed copy of Court order served with the claim form – Sealed copy of Order served after the expiration of the six months' extension permitted by Rule 8.15(2) of the Civil Procedure Rules – Order appearing to extend the validity of the claim form for a period longer than six months – What is required in making an application for a second extension – Whether default judgment irregularly obtained – Rule 13.2 of the Civil Procedure Rules.

MASTER N. HART-HINES

[1] By Notice of Application filed on July 4, 2018, the Insurance Company of the West Indies Limited (hereinafter "the Applicant") applied to have an Order for

specified service (hereinafter "the Order") made on June 23, 2015 set aside, on the basis that the Applicant was not able to locate the 2nd Defendant and therefore was unable to bring the claim form to his attention. The Order permitted the Claimant to serve the claim form and particulars of claim on the Applicant, the insurer for a vehicle owned by the 2nd Defendant at the time of the accident. The Order also extended the validity of the claim form, from June 23, 2015. The Applicant also seeks permission to intervene in the proceedings, an extension of the time to make the application, and seeks to set aside default judgment entered on March 14, 2017.

[2] The genesis of the claim is a motor vehicle accident which occurred along the Queens Highway in the parish of St. Ann on January 17, 2010. It is alleged by the Claimant/Respondent that he was injured when a vehicle bearing registration 5410FD was so negligently operated by 1st Defendant that he caused a collision with vehicle bearing registration GG6890, in which he was a passenger.

BACKGROUND AND CHRONOLOGY

[3] The chronology of the events is relevant to the determination of the application. The chronology is as follows:

i. On August 10, 2007 an insurance policy was obtained from the Applicant, ICWI, in respect of a 1995 Isuzu Pick-up bearing registration 5410FD.

ii. On January 17, 2010 the aforementioned motor vehicle accident occurred.

iii. On February 2, 2010 the said vehicle, owned by the 2nd Defendant, was no longer insured by the Applicant.

iv. On September 9, 2014 the claim form and particulars of claim were filed. Two earlier claim forms were filed on April 28, 2010 and April 11, 2012 in respect of the said accident, but they were not served. On each occasion that the previous claim forms were filed, applications were filed at least four months prior to the expiration of the claim forms to extend their validity, but the applications were not heard prior to their expiration. Previous Notices of Proceedings were served in respect of the earlier claims.

v. On September 9, 2014 the Notice of Proceedings was served on ICWI.

vi. On October 8, 2014 an application was filed to dispense with personal service on the 2nd Defendant and to permit the service of the claim form and particulars of claim on his insurers. The Application was supported by an affidavit sworn by Attorney, Oraina Lawrence, and an affidavit sworn by Delroy Blake, Process Server, indicating that an attempt made to locate the 2nd Defendant was unsuccessful. Mr. Blake stated that on September 19, 2014 at 10am he went to Runaway Bay, St. Ann in search of the 2nd Defendant. He averred that he went to a Shell Gas Station in Runaway Bay, stopped by two houses where persons were sitting on their verandah, spoke with neighbours, made inquiries at the Police Station and Post Office, and also spoke with persons in close proximity to Runaway Bay. Ms. Lawrence stated that the 2nd Defendant's motor vehicle was insured by ICWI at the time of the accident and that the Notice of Proceedings was served on ICWI, which unreservedly accepted same.

vii. On June 23, 2015, the application was heard ex parte and an Order to dispense with personal service and to permit the service of the claim form and particulars of claim on the Applicant was made. Counsel Ms. Oraina Lawrence appeared before the Master.

viii. On December 16, 2015, the Formal Order was filed.

ix. On December 16, 2015 the unsealed Order along with the claim form and particulars of claim were served on the Applicant.

x. On January 16, 2016 the claim became statute barred.

xi. On May 5, 2016 the Formal Order was perfected. The Registrar signed it after corrections were made to paragraphs 1 and 3. The sealed Order along with the claim form and particulars of claim were served on the Applicant that day.

xii. On January 20, 2016, March 31, 2016, May 31, 2016, June 6, 2016 and June 7, 2016 phone calls were made by the Applicant’s staff to numbers held for Samuel Taylor and Alphanso Clarke, but they were not reached.

xiii. On June 7, 2016 a letter was written to the 2nd Defendant. The Applicant did not receive a response from the 2nd Defendant.

xiv. On March 14, 2017, a Request for Default Judgment was filed. Judgment in default was entered by the Registrar in Binder 770 Folio 277 from that date.

xv. On February 13, 2018 the 1st Defendant was reached by telephone and he informed the Applicant that the 2nd Defendant was not in Jamaica but he

would try to get a phone number for him. He did not call the Applicant and was not reached thereafter.

xvi. On March 6, 2018 the Applicant hired Investigators to locate the 2nd Defendant. On 17th May, 2018 Detect Investigations Company Limited wrote to the Applicant to indicate that investigations revealed that the 2nd Defendant had migrated.

xvii. On July 4, 2018, an Application was filed to set aside the Order made on June 23, 2015.

xviii. On November 12, 2019 the application for listed to be heard but was adjourned for an affidavit to be filed by counsel Ms. Oraina Lawrence in respect of the hearing on June 23, 2015. Specifically, clarification was sought as regards whether two applications were heard on June 23, 2015 and whether two extensions were granted. The electronic case database Judicial Enforcement Management System ("JEMS") indicates that application had been filed on behalf of the Respondent.

[4] Up to the time of writing this judgment, the paper file was not located. In the circumstances, I have only seen the documents which were scanned and saved on the electronic case database. Paragraph 1 of the Respondent's application filed on October 8, 2014 stated *"[t]hat in the event that the Claim Form herein has expired at the date of hearing of this Application, an extension of the validity of the time of this Application pursuant to Rule 8.15(4) of the Civil Procedure Rule".* The typed Minute of Order states *"[o]rder granted in terms of paragraphs 1 as amended, 2, 3, 4, 5 and 6 of Notice of Application filed October 8, 2014"*. Having not seen the original Minute of Order, I can only be guided by what was filed and by the perfected and sealed Formal Order which was corrected and signed by the Registrar on May 5, 2016. Paragraph 1 of the unperfected Order states:

> *"[t]hat the validity of the Claim Form is extended for a period of six months from the date hereof pursuant to Rule 8.15(4) of the Civil Procedure Rules*".

[5] Paragraph 1 of the perfected Order states (as it appears):

> (i) That the validity of the Claim Form and particulars of claim is extended for a period of six months from the date hereof; ~~pursuant to Rule 8.15(4) of the Civil Procedure Rules;~~

[6] In his affidavit in support of the application filed on July 4, 2018, Mr. Palmer stated that the report from the private investigator indicated that the 2nd Defendant had migrated and that his contact details are unknown. In the circumstances, the Applicant was not able to bring the contents of the claim form and particulars of claim to the attention of the 2nd Defendant.

THE SUBMISSIONS

[7] Mr. Miguel Palmer submitted that the Applicant's delay in filing the application was due to inadvertence following the departure from the Applicant company by the Attorney who had conduct of the matter. Counsel also submitted that the Claimant's Application for substituted service should have been refused on June 23, 2015 as the affidavits in support did not disclose what efforts were made to locate the 1st and/or 2nd Defendants.

[8] Mr. Palmer also submitted that the Applicant took sufficiently reasonable steps to locate and contact the 2nd Defendant but was not able to do so. Reliance was placed on the report of the private investigator as well as the file minutes which suggested that phone calls were made and that a letter was sent in an effort to contact the 2nd Defendant. Counsel relied on the cases of ***Insurance Company of the West Indies Ltd. v Shelton Allen (Administrator of the estate of Harland Allen) et al*** [2011] JMCA Civ. 33 (hereinafter "***Shelton Allen***"), ***Jephtah Davis v Roy Marshall*** [2017] JMSC Civ 161, and ***Morgan-Taylor v. Metropolitan Management Transport Holdings Limited*** (unreported) Supreme Court, Jamaica, Claim No 2007HCV0938, judgment delivered November 24, 2011.

[9] Counsel Mr. Palmer submitted that an order for substituted service is not intended to deprive a litigant of his right to be made aware of a claim instituted against him. It was further submitted that since there was no evidence before the Court that the 2nd Defendant was aware of the proceedings filed against him, it is in the interests of justice that the Order made on June 23, 2015 and the default judgment be set aside.

[10] Ms. Christina Beckford submitted on behalf of the Respondent that the Applicant made insufficient efforts to locate the 2nd Defendant and had not acted with alacrity in filing its application and in attempting to bring the claim form and particulars of claim to the attention of the 2nd Defendant. Counsel relied on the decision of ***Damion Welch v Roxneil Thompson and Another*** [2018] JMSC Civ 59 on the issue of severe delay.

THE ISSUES

[11] The following are the issues that have been identified for consideration:

(1) Should the application be heard despite the delay in filing it?

(2) Was the claim form likely to come to the 2nd Defendant's attention through the Applicant?

(3) Has the Applicant taken all reasonable steps to locate the 2nd Defendant?

(4) Was the service of the Order made on June 23, 2015 on the Applicant "good service"?

(5) What would be the effect of an irregular service of the claim form?

THE LAW AND ANALYSIS

[12] I have considered the case law cited by counsel for the parties. I will briefly summarise the law relevant to this application as I consider the issues.

Should the application be heard despite the delay in filing it?

[13] Rule 11.16(2) of the Civil Procedure Rules (hereinafter "CPR") indicates the timeframe within which an application should be brought to set aside or vary an Order made on an application without notice. Rule 11.16(2) provides:

> *"(2) A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent."*

[14] However, the Court may extend the time for compliance with any rule, and I am guided by the overriding objective of the CPR in deciding whether or not to permit the application to be heard. Despite the Applicant's apparent tardiness, there are issues to be considered. Having regard to the principles set out in

Leymon Strachan v The Gleaner Company Limited and Stokes Court of Appeal, Jamaica, Supreme Court Motion No 12/1999, judgment delivered 6 December 1999 I consider it appropriate and just to extend the time within which to make this application and allow it to be heard. In that case, Panton JA (as he then was) stated at page 20 that in exercising its discretion to extend time generally, the Court should consider factors such as (1) the length of the delay in filing the application supported by affidavit evidence, (2) the explanation for the delay, or lack thereof, and (3) the possible prejudice occasioned by the delay. Further, Panton JA said:

> *"(4) 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****." (My emphasis)*

[15] Rules 1.1(1) and 1.1(2)(d) and 26(2)(c) of the CPR provide:

> *"**1.1(1)** These Rules are a new procedural code with the overriding objective of enabling the Court to deal with cases justly.*
> *(2) Dealing justly with a case includes -*
> *(d) ensuring that it is dealt with expeditiously and fairly; …"*
>
> *"**26… (2)** Except where these Rules provide otherwise, the Court may -*
> *(c) 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"*

Was the claim form likely to come to the 2nd Defendant's attention?

[16] An alternative method of service specified in an order must be likely to bring the claim form to the knowledge of the Defendant. Consequently, service on the insurer of a Defendant is permitted where it is likely that the Defendant will be able to ascertain the contents of the claim form. In ***Shelton Allen***, Morrison JA (as he then was) reiterated this when he considered Rules 5.13 and 5.14 of the CPR, and when he cited dictum in ***Porter v Freudenberg; Krelinger v Samuel and Rosenfield; Re Merten's Patent***: [1915] 1 KB 857. There, Lord Reading CJ said at pages 887-888:

> *"[a Defendant] is, according to the fundamental principles of English law, entitled to effective notice of the proceedings against him.… In order that substituted service may be permitted,* ***it must be clearly shown that the plaintiff is in fact unable to effect personal service and that the writ is likely to reach the Defendant or to come to his knowledge*** *if the method of substituted service which is asked for by the plaintiff is adopted." (My emphasis)*

[17] The premise of the Claimant's application in 2014 was that the Applicant insurance company was in a position to locate the 2nd Defendant and bring the claim form and particulars of claim his attention because the Applicant was the insurer for the 2nd Defendant's vehicle at the time of the accident. I am not of the opinion that should be the sole consideration. Dictum in ***Nico Richards v Roy Spencer (Jamaica International Insurance Co Ltd - Intervening)*** [2016] JMCA Civ 61 (at paragraph 33) suggests that a court hearing such an application should be mindful of the amount of time that has elapsed between the date of the accident and the date of the hearing. With the passage of time, the contractual relationship between the Defendant and the insurer might have ceased, and the insurer might have no knowledge of the whereabouts of the Defendant.

[18] I do not agree with Mr. Palmer's submission that the affidavits filed on behalf of the Claimant in 2014 did not disclose the efforts made to locate the 2nd Defendant. However, having regard to the fact that four (4) years had passed between the date of the accident and the date of the hearing, and since there was no evidence that a relationship between the insurance company and the 2nd Defendant still existed, there was a real possibility that the claim form would not come to the 2nd Defendant's attention through his insurers.

[19] It is my opinion that it would have been more prudent for the Respondent's Attorneys to serve the Application for service by a specified method on the insurance company, informing the Applicant of the date and time of the hearing. I am of the opinion that there should be *inter partes* hearings in respect of such applications, with sufficient notice of the hearing being afforded to an insurer to allow it time to attempt to locate its insured. Had the application been served on the Applicant shortly after the first claim form was filed on April 28, 2010, it would have become apparent to both the Applicant and the Claimant's Attorneys in 2010, that the 2nd Defendant was not ordinarily resident in Jamaica, and that the relationship between the Applicant and the 2nd

Defendant did not subsist. This might have averted the need to file two further claims and for this application to set aside the Order made on June 23, 2015.

[20] The filing of multiple claims and applications is expensive and time-consuming and this is contrary to the overriding objective of the CPR. The CPR was expected to herald the beginning of a speedier dispensation of justice. This means that a multiplicity of proceedings, delays in litigation and unnecessary satellite litigation are to be avoided and an *inter partes* hearing would avoid satellite litigation and wasted expense.

Has the Applicant taken all reasonable steps to locate the 2nd Defendant?

[21] In considering whether the Applicant has demonstrated that it made reasonable efforts to locate the 2nd Defendant, I am guided by the decision of ***British Caribbean Insurance Company Limited v David Barrett and Others*** [2014] JMCA App 5. There, Brooks JA considered the efforts made by the Applicant insurance company to locate a Defendant (Ivor Ruddock) with whom an insurance contract had existed, and to locate the driver of the vehicle (Jason Evans). There, the Applicant relied on the fact that it had sent letters and made telephone calls. However, the Court of Appeal upheld the decision of Master Lindo (as she then was) in refusing to exercise of her discretion to set aside the substituted service order, since there was no evidence that attempts were made to personally deliver any letter to Mr. Ruddock's home or work address and no letters were posted to his home address.

[22] In the instant case, I am satisfied that the Applicant did all that could reasonably be done, having regard to the fact that the insured seemed to have migrated years before the claim form was served on the Applicant. However, the Applicant did not act with alacrity in filing its application to set aside the Order for specified service and in attempting to locate its insured. While it is clear that efforts were being made to locate the 2nd Defendant, the affidavits in support of the application do not actually offer any explanation for the delay in filing the application between June 7, 2016 and March 6, 2018. A delay of

approximately two years seems inordinately long having regard to the nature and number of the steps taken to locate the 2nd Defendant. Notwithstanding, I have noted that the claim became statute barred shortly after the service of the unsealed copy of the Order in December 2015. It is clear therefore, that the delay by the Applicant in filing its application has not prejudiced the Respondent. This case is therefore distinguishable from the facts in the case of ***Welch v Thompson***, on which counsel Ms. Beckford relied.

Was the service on the Applicant "good service"?

[23] It is important to note the purpose of service of the claim form. In ***Hoddinott v Persimmon Homes (Wessex) Ltd*** [2008] 1 WLR 806, it was said at page 821, paragraph 54:

> *"…service of the claim form serves three purposes. The **first** is to notify the defendant that the claimant has embarked on a formal process of litigation and to inform him of the nature of the claim. The **second** is to enable the defendant to participate in the process and have some say in the way in which the claim is prosecuted: **until he has been served, the defendant may know that proceedings are likely to be issued, but he does not know for certain and he can do nothing to move things along**. The **third** is to enable the court to control the litigation process …" (My emphasis)*

[24] Rules 8.15(5) and 3.9 of the CPR provide as follows:

> ***"Rule 8.15… (5)** Where an order is made extending the validity of the claim form*
> *(a) the claim form must bear a certificate by the claimant or the claimant's attorney-at-law showing the period for which the validity of the claim form has been extended; and*
> *(b) a **sealed copy of any order made must be served with the claim form**."*
>
> ***"Rule 3.9** (1) **The court must seal the following documents on issue***
> *(a) the claim form; and*
> *(b) all judgments, **orders** or directions of the court." (My emphasis)*

[25] Having regard to the mandatory wording of Rule 8.15(5), the service of the unsealed Formal Order on December 16, 2015, could not be regarded as good service within the meaning of Rule 5.14(1) of the CPR. At best, it was a "courtesy copy" which was being supplied to the Applicant. By the time the perfected Order was served on May 5, 2016, the claim form had expired.

[26] The sealed and signed order suggests that two six months' extensions were granted. However, Rule 8.15(2) of the CPR permits one six-month extension

to be made in respect of any one application. Notably, at the time of the hearing of the application on June 23, 2015, the claim form had not yet expired. Therefore, it would also have been unnecessary for the Master to extend the validity of the claim form for a period longer than six months.

[27] Ms. Oraina Lawrence was asked to supply clarification as regards whether two applications were heard on June 23, 2015, but no affidavit was forthcoming. Even if an oral application had been made for a second extension, an affidavit ought to be filed to ground said oral application. That second affidavit would set out what transpired since the date of filing the first application. There is no evidence on the case database that a second affidavit was ever filed. Rule 8.15(2) and 8.15(3) of the CPR provide:

> *"**8.15**… **(2)** The period by which the time for serving the claim form is extended may not be longer than 6 months on **any one application**.*
> ***(3) An application under paragraph (1)***
> *(a) **must be made within the period***
> *(i) for serving the claim form specified by rule 8.14; or*
> *(ii) of **any subsequent extension** permitted by the court, and*
> *(b) may be made without notice **but must be supported by evidence on affidavit**."*
> *(My emphasis)*

What is the effect of an irregular service of the claim form?

[28] Once the claim form has expired, it cannot be served. The law is clear that when a default judgment is obtained without due service of process, it will be set aside *ex debito justitiae*, if it has not been waived (see Rule 13.2 of the CPR and ***B & J Equipment Rental Limited v Joseph Nanco*** [2013] JMCA Civ 2). Where the Court Registry makes an error and prematurely or irregularly entered default judgment it must be set aside *ex debito justitiae* (see ***Anlaby and Others v. Praetorius*** (*1888*), 20 *Q.B.D. 764*).

[29] I am satisfied that service of the claim form and particulars of claim on the Applicant was irregular since they were not served with a signed and sealed Formal Order on December 16, 2015. The irregularity was not waived by the Applicant, as no Acknowledgement of Service was filed. The default judgment was therefore obtained without due service of process.

Observations on delays

[30] Mr. Palmer has submitted that a Claimant has a duty to properly prosecute his case, and despite the fact that three claims were filed, the Claimant delayed in serving the signed and sealed Formal Order on the Applicant. Mr. Palmer has correctly submitted that until such time as the Claimant fulfilled his obligation to bring this claim to the 2nd Defendant's attention, the matter would not be progressed. I have noted that in his affidavit in response to this application, Mr. Sean Kinghorn has bemoaned the fact that there were several delays in the Supreme Court Registry which contributed to the delay in the hearing of the applications to extend the validity of the claim forms. Notwithstanding, it does appear that there was a delay by his office in filing the Formal Order, and then there was a further delay in the Supreme Court Registry in sealing the Order. It is unfortunate that there were repeated delays in the Registry in scheduling applications and in sealing Orders. However, having regard to resource constraints and/or other issues within the Registry, it would be prudent for counsel to pursue the Registry for hearing dates and Orders.

ORDERS

[31] In light of the foregoing, I now make the following orders:

1. The Applicant is granted permission to intervene in the proceedings in order to make an application to set aside the Order for specified service, made on June 23, 2015.
2. The time within which to make the application is extended.
3. The application to set aside the Order made on June 23, 2015, is granted.
4. The Default Judgment entered in Binder 770 Folio 277 on March 14, 2017 is set aside.
5. No order as to costs.
6. Leave to appeal is granted.