[2023] JMSC Civ 150

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. SU 2020 CV 02902

BETWEEN	**DWAYNE JACOBS**	**CLAIMANT**
AND	**PROGRESSIVE GROCERS**	**1ST DEFENDANT**
AND	**WILLIAM G REID**	**2ND DEFENDANT**

Richard Reitzin instructed by Reitzin Hernandez for the claimant
Lesley-Ann Stewart instructed by Mayhew Law for the 1st defendant

HEARD: 4 MAY & 29 JUNE 2023

Civil Procedure - Rule 13.3 - application to set aside default judgment; application for extension of time to file defence – prospects of success

MASTER C THOMAS

INTRODUCTION

[1] The 1st defendant by way of its application filed on 22 December 2021 sought the following substantive orders: -

1. That any judgment which may have been entered against the 1st Defendant in Default of Acknowledgment of Service and all subsequent proceedings be set aside.
2. That the time within which to file and serve the 1st Defendant's Defence and/or Counterclaim be until 14 days after the hearing of this application.
3. …
4. …

[2] The grounds of the application were as follows: -

1. Pursuant to Rule 13.2(a), the 1st Defendant has not received the claim documents.

2. Pursuant to Rule 13.3(1) and (2) of the Civil Procedure Rules, 2002, the Applicant has a real prospect of successfully defending the claim.

3. The Applicant has a good explanation for the failure to file an Acknowledgment of Service in time.

4. The Applicant made this application as soon as was reasonably practicable after becoming aware of the request for judgment in default.

5. The Applicant will be severely prejudiced if the Judgment in Default of Acknowledgement of Service is not set aside.

6. Pursuant to CPR Rule 10.3(9), the Defendant may apply for an order extending the time for filing a defence.

7. Pursuant to CPR Rule 26.1(c), the Court may 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] On 29 June 2023, I made the following orders on the defendant's application:

1. The time within which to file and serve the 1st defendant's defence is extended to 13 July 2023.

2. Costs of the application to the claimant to be taxed if not agreed.

I also made consequential orders including that the parties should proceed to mediation and in the event of an unsuccessful mediation, to attend a case management conference.

[4] As a consequence of a request made by Mr Reitzin, I now reduce the reasons for my decision to writing.

BACKGROUND

[5] The claim arose from a motor vehicle collision that occurred on 15 April 2020 at about 9:00 a.m. In his particulars of claim, the claimant avers that he is the owner of a Silver Subaru motor vehicle, bearing license plate with registration number 8352 GG. The 2nd defendant was driving a red 2014 Toyota Hilux, bearing license plate with registration number CL-0053, owned by the 1st defendant.

[6] The claimant avers that he was driving in an approximately easterly direction along the road leading from the Tax Administration Jamaica office located at Constant Spring Road. He avers that he was driving into the intersection of that road on the green light, while at the same time, the 2nd defendant, driving in an approximately northerly direction on Constant Spring Road, drove through the red light facing him causing a collision between the two vehicles.

[7] On 3 August 2020, a claim form and particulars of claim were filed seeking damages for negligence plus interest. On 22 October 2020, the claimant filed a request for judgment in default of acknowledgment of service. An affidavit of service indicating service by way of registered post to Lot 15 Twickenham Park Estate, Spanish Town in the parish of Saint Catherine was also filed on 22 October 2020. On 22 December 2021, the 1st defendant filed the present application.

[8] The 1st defendant filed an affidavit in support of the application to set aside default judgment which was sworn to by Craig Chin, one of the directors of the 1st defendant. Mr Chin deponed that as at the date of his affidavit, the 1st defendant had not received the claim documents nor the registered slip indicating that there was a registered article of mail to be collected.

[9] Mr Chin deponed that JN General Insurers Company Limited ("JN General"), the 1st defendant's insurers, informed the 1st defendant that it had received a Notice

of Proceedings in or around August 2020. He further stated that in November 2021, the claimant's attorney wrote to JN General Insurers concerning details of the claim, revealing that the claim documents were served on the 1st defendant's registered office under cover letter dated September 15, 2020. Mr Chin maintained that the company became aware of the claim in November 2021, after this exchange.

[10] Mr Chin's evidence is that once JN General became aware of the stage of the proceeding, the claim was forwarded to external counsel to be instructed in the matter and to provide the necessary litigation support. As a result, no acknowledgment of service and defence had been filed on the 1st defendant's behalf.

[11] Mr Chin further deponed also that further to a report of the 1st defendant's driver, the incident occurred without any negligence or breach of duty on the part of the 2nd defendant. The 2nd defendant was driving along Constant Spring Road in the direction of Manor Park when upon approaching the intersection of the road leading to the Constant Spring Tax Office and Constant Spring Road, he proceeded through the intersection, once the traffic light signalled green to him. At the same time, the claimant was exiting the Constant Spring Tax Office, and drove into the defendant's path causing a collision between both vehicles.

SUMMARY OF THE SUBMISSIONS

Submissions advanced on behalf of the 1st defendant

[12] Learned counsel Ms Stewart for the 1st defendant acknowledged that the defendant did not comply with rule 9.3(1) of the Civil Procedure Rules ("CPR") which requires that an acknowledgment of service be filed within fourteen (14) days of the service of the claim form. Ms Stewart also conceded that the 1st defendant did not file its defence within forty-two (42) days after the date of service of the claim form. She stated that prima facie, there was a delay as the application for extension of time was filed in December 2021. Ms Stewart submitted that delay by itself, is not determinative of the application and she urged the court to take into account other considerations.

[13] Ms Stewart argued that Mr Chin's affidavit offers a good explanation for the delay, this being that the registered slip was never received by the company and so the claim form and particulars of claim were never received by the 1st defendant. She argued that subsequently, instructions were given to external counsel to defend the matter on 21 December 2021, even though the time for the filing of the acknowledgment of service and defence had already run out. Ms Stewart argued that the application was made urgently, filed in December, five (5) days before the Christmas holidays. Learned counsel stated that the affidavit in support was filed in January, after full instructions were obtained. Consequently, she maintained that the application was made without delay in the circumstances.

[14] Ms Stewart also argued that Mr Chin's affidavit exhibited a draft defence disclosing a meritorious defence and accordingly the extension of time should be granted. She stated that the factual circumstances asserted in opposition to the claim reveal that the negligence asserted by the claimant is contested. This draft defence, she maintained, demonstrates a reasonable prospect of success to dispute the claimant's claim of negligence. Ms Stewart stated that the 1st defendant ought to be granted an opportunity to defend the claim so that liability can be determined as between the parties.

[15] Ms Stewart maintained that default judgment has not yet been entered so there would be no deprivation of a judgment, if the defence were allowed to be filed. She submitted that any undue prejudice suffered by the claimant by the delay in filing the defence out of time is remedied by an award of costs to the claimant. Further, the prejudice to be suffered by the 1st defendant if the application were to be denied would far outweigh that to be suffered by the claimant if the defendant was not permitted to enter a defence including being deprived of an opportunity to challenge this claim whilst having a meritorious defence.

[16] To support these submissions, Ms Stewart made reference to the authorities of **Paulette Richards v North East Regional Health Authority et al** [2020] JMSC Civ 90, **Strachan v The Gleaner Company Motion No. 12 | 1999** (delivered on 6 December 1999) and **Bennett & Bennett v Williams** [2013] JMSC Civ 194.

[17] With respect to setting aside the default judgment, relying on **Victor Gayle v Jamaica Citrus Growers and Anthony McCarthy** 2008 HCV 05707 (delivered 4 April 2011) Ms Stewart argued that the primary consideration was whether the defence has any real prospect of success. She argued that the 1st defendant has a reasonable prospect of successfully defending the claimant as disclosed by the affidavit of merit of Craig Chin. Further, the application was filed as soon as reasonably practicable, having been filed shortly after it came to the 1st defendant's attention that an application for default judgment had been filed and the reason for the failure to file an acknowledgment of service and defence was that the 1st defendant did not receive the registered slip and the claim form and the particulars of claim.

Submissions advanced on behalf of the claimant

[18] Learned counsel Mr Reitzin submitted that there is no dispute as to the address of the 1st defendant's registered office. Mr Reitzin argued that non-receipt of the claim documents, as distinct from non-delivery is irrelevant.

[19] Mr Reitzin argued that when the claimant sent the claim form by prepaid registered post to the registered office of the company and it is not returned and the claimant has no intimation that it has not been delivered, it is deemed to have been served on the company and to have been served twenty-one (21) days after posting. He stated that if no acknowledgment of service of service is entered within fourteen (14) days thereafter, the claimant is acting quite regularly in requesting interlocutory judgment in default of acknowledgment of service. Mr Reitzin maintained that if the defendant seeks to set aside the judgment, it ought to explain the circumstances and go on to show that it has a real prospect of successfully defending the claim. To buttress these submissions, Mr Reitzin relied on the authorities of **ACE Betting Co. Ltd. v Horseracing Promotions Limited** SCCA 70 &71 OF 1990 (delivered 17 December 1990)**; R v Appeal Committee of County of London Quarter Sessions ex parte Rossi** [1956] 1 QB 682 and **A/S Catherineholm v Norequipment Trading Limited** [1972] 2 WLR 1243 at 1247.

[20] Mr Reitzin submitted that provided that delivery is not disproved, the fact of non-receipt does not displace the result that delivery is deemed to have been effected at the time at which it would have taken place in the ordinary course of the post. Mr Reitzin relied on the case of **Fancourt v Mercantile Credits Ltd**. [1983] HCA 25; (1983) CLR 87 (11 August 1983).

[21] It was also submitted that there is no evidence of the 1st defendant having a real prospect of successfully defending the claimant's claim. Mr Reitzin argued that Mr Chin in his affidavit referred to an alleged report. However, this is inadmissible as hearsay in the strict sense as the affidavit did not satisfy the dictates of rule 30.3(2)(b)(ii) and Mr Chin did not identify the source by name as is required. He submitted that neither Mr Chin's affidavit nor the draft defence furnished any evidence from which the court could form the view that the 1st Defendant has a real prospect of successfully defending the claimant's claim. In support of these submissions, Mr Reitzin relied on the authorities of **Kevin Moore v Symsure Limited** [2013] JMSC Civ 209; **Consolidated Contractors v Masri** [2011] EWCA Civ 21 and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 12.

Discussion and Analysis

[22] Although the application sought to set aside default judgment as one of its orders, the thrust of Ms Stewart's submission was on the application to extend time to file defence. This appears to have been on the basis that no default judgment had been entered up to the time of the hearing of the application. I therefore determined firstly whether the application to be considered ought to be one to extend time or to set aside default judgment.

[23] In making a determination on this issue, I considered the decision in **Workers Savings & Loan Bank Ltd v McKenzie; Workers Savings and Loan Bank v Macro Finance Corporation & Ors** SCCA No 102 & 103/1996 (delivered 3 December 1996), **Shane Paharsingh v Attorney General** [2012] JMCA Civ 6 and **Conrad Graham v National Commercial Bank,** SCCA 37/2009 (delivered 25 September 2009). **Workers Savings & Loan Bank Ltd** is a case which was decided under the default judgment provisions of the Judicature (Civil

Procedure Code) Law ("CPC"). In that case, the judge at first instance dismissed the defendant's application for leave to file and deliver its defence out of time in circumstances where prior to the defendant's application, the claimant had filed the necessary documents for default judgment to be entered. The judge examined the documents that were filed pursuant to the request for default judgment and having determined the documents were in order, dismissed the application holding that the proper course was for the defendant to file an application to set aside default judgment. This decision was upheld on appeal. It seems to me then that the decision is authority for the principle that under the CPC, where documents were filed to obtain a default judgment and no default judgment had been entered at the time of the consideration of an application for extension of time to file defence, the court was empowered to examine the documents filed pursuant to the request for default judgment to determine if they were in order and if the documents were in order, to treat the default judgment as having been entered; and in those circumstances, the proper application for the court to consider would be an application to set aside the default judgment.

[24] **Shane Paharsingh** and **Conrad Graham** are both cases which were decided subsequent to the coming into effect of the CPR and concerned the effect of the transitional provisions of the CPR. Both were concerned with circumstances in which the documents filed to obtain default judgment were filed under the CPC. In **Conrad Graham**, although the Court of Appeal applied the principle in **Workers Savings & Loan Bank** it concluded that the default judgment could not have been entered at the time of the request for judgment because the documents were not in order. In **Shane Paharsingh**, Phillips JA, as a single judge on a procedural appeal, concluded that the documents filed to obtain the default judgment having been in order, the default judgment was in existence from the date of the filing of the documents and therefore were proceedings in existence at the date of the coming into effect of the CPR.

[25] I noted that the provisions of the CPC dealing with the entry of default judgment differed in at least two material respects from the provisions of the CPR dealing with the entry of judgment in default of defence. The CPC did not contain any equivalent provision to rule 12.5(e) of the CPR which is to the effect that default

judgment should not be entered where there is a pending application for extension of time to file defence. The effect of this provision is that where there is an application for extension of time to file defence, the court cannot proceed to consider whether the default judgments are in order as such a course would be barred by the provisions of rule 12.5(e). Instead, the court should consider the application for extension of time to file defence first. Also, in relation to default judgment for the failure to file an acknowledgment of service, the CPC did not contain provisions similar to rule 9.3(4) of the CPR that allows a defendant to file an acknowledgment of service at any time prior to the claimant filing a request for judgment.

[26] It therefore seemed to me that despite the difference in the provisions of the CPC and the CPR, the provisions were not at such variance so as to render the decision in **Workers Savings and Loan Bank** totally inapplicable. However, that decision would be applicable only in circumstances in which a request for judgment had been filed prior to the filing of an acknowledgement of service, no default judgment had been entered and subsequently an application had been filed seeking an extension of time to file acknowledgment of service and defence. I came to the view that the upshot of this was that in the circumstances of the instant case where the request for judgment was in default of acknowledgment of service and no acknowledgment of service had been filed prior to the filing of this request, I was entitled to examine the documents filed in pursuance of the request for default judgment to determine if they were in order, and if so, the application to be considered should be one to set aside default judgment notwithstanding the fact that no default judgment had been entered.

[27] I therefore proceeded to consider the documents filed. As I already indicated in paragraph [7], the request was for judgment in default of acknowledgment of service. The affidavit of service of the claim documents, which was sworn to by the process server indicated that on 15 September 2020 at 10:00am, a prepaid registered letter enclosing the claim form and particulars of claim was posted to the 1st defendant's registered office. The 1st defendant's registered office's address was stated in the affidavit as Lot 15, Twickenham Park Estate. A copy of the claim form was exhibited to which was attached the documents required

by rule 8.16 of the CPR to be served along with the claim form. The process server stated that the documents had not been returned undelivered.

[28] The 1st defendant being a registered company, service on its registered office by the method stated in the affidavit of service, that is, registered mail, was authorised by rule 5.7(b) of the CPR and service was proven in accordance with rule 5.11 of the CPR which sets out how service by registered post is proven. However, although the 1st defendant is not denying that the address to which the letter was posted was the registered address of the 1st defendant, it is disputing service on the basis that it did not receive the documents or the registered slip.

[29] The circumstances in which claim documents sent by registered mail are considered as being served and the claimant consequently entitled to default judgment upon the failure of the defendant to file the required acknowledgment of service or defence have been conclusively settled by our Court of Appeal in **ACE Bettings Co Ltd**, which was relied on by Mr Reitzin. In that case, Forte JA stated that when the plaintiff sends a copy of the writ by prepaid registered post to the registered office of the company and it is not returned and he has no intimation that it had not been delivered, it is deemed to have been served on the company on the day on which it would ordinarily be delivered. If no appearance was entered, the plaintiff is acting quite regularly in obtaining judgment. **ACE Bettings Co Ltd** was applied by Foster Pusey JA in **Andrew Fletcher (representative capacity Estate Margaret Fletcher) v Devine Destiny Co Ltd** [2021] JMCA Civ 42.

[30] I therefore was of the view that Mr Reitzin was correct in his principal submission on this issue that there is a distinction between lack of service and non-receipt of the documents. If the documents are not returned unclaimed at the date of the filing of the request for default judgment, the mailed documents are to be treated as being delivered within 21 days of posting. The only evidence before the court in relation to whether the documents were returned is to be found in the affidavit of service in which the deponent stated that the documents had not been returned. Therefore, at the date of the request for default judgment, the claim documents were to be regarded as having been

properly served and the defendant having failed to file an acknowledgment of service within 14 days of the deemed date of service of 6 October 2022, the defendant was entitled to apply for judgment and to have judgment in default of acknowledgment of service entered accordingly. Therefore, I was of the view that the proper application for consideration was to set aside a regularly obtained default judgment.

[31] Authorities such as **Rohan Elroy Pessoa v Misty Samuels** [2014] JMCA App 25 and **Russell Holdings Ltd v L & W Enterprises** [2016] JMCA Civ 39**,** both decisions of our Court of Appeal, as well as **Victor Gayle v Jamaica Citizens Bank** on which Ms Stewart relied, make it clear that the primary consideration is whether there is a real prospect of successfully defending the claim; however, the other factors set out in rule 13.3(a)(b), which are, applying as soon as reasonably practicable after finding out about the judgment and providing a good explanation for the failure to file an acknowledgment of service must also be considered.

[32] **John McKay v Attorney General of Jamaica**, which was relied on by Mr Reitzin is authority for the principle that the affidavit in support of the application to set aside default judgment must be sworn to by a person who has personal knowledge of the facts or defence or that what appeared in the defence is true. **Marcia Jarrett (Administratrix of estate of Dale Jarrett) v South East Regional Health Authority & Ors** 2006 HCV 00816 (delivered 3 November 2006) demonstrates that this requirement may be met in circumstances where the "matters are not within the personal knowledge of the deponent provided that certain conditions are satisfied", being those set out in rule 30.3 of the CPR.

[33] The affidavit in support of the application was sworn to by one of the directors of the 1st defendant, Mr Chin. He states at paragraph 2 that the contents of the affidavit are true to the best of his knowledge, information and belief as gleaned from the defendant's records. He states that "further to a report of the 1st defendant's driver, the incident occurred without any negligence or breach of duty on the part of the 2nd defendant" and it is thereafter stated that the 2nd defendant was driving along Constant Spring Road in the direction of Manor

Park when upon approaching the intersection of the road leading to the Constant Spring Tax Office and Constant Spring Road, he proceeded through the intersection, once the traffic light signalled green to him. At the same time, the claimant was exiting the Constant Spring Tax Office, causing a collision between both vehicles.

[34] I accepted that this aspect of the evidence is hearsay evidence. Mr Reitzin argued that it does not comply with the dictates of rule 30.2(3)(b)(ii) of the CPR. which permits hearsay evidence to be given where the source of the information and belief are stated. He relied on **Kevin Symsure** in which the court in considering an affidavit in support of an application for security for costs, had stated that "merely to state that 'the address he provided to Symsure at the time of his engagement as a consultant' without the concomitant preface of 'it is my information and belief' and the source thereof' cannot be offset by an omnibus paragraph such as what paragraph 2 attempts to do as the affidavit must have regard to identifying 'which of the statements in it (the affidavit) are made from the deponent's own knowledge and which are matters of information or belief"'.

[35] With the greatest of respect to the court in **Kevin Symsure**, I am unable to agree with the view that rule 30.3 in stating that "the affidavit should indicate- (i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and (ii) the source of any matters of information and belief" requires that this information must be prefaced by a mandatory formulation of "it is my information and belief". In my view, while this formulation may be preferred and is invariably used in practice, what rule 30.3 really requires is that the affidavit must make clear whether the information is from the deponent's personal knowledge; and where it is not, the source of the information should be provided with sufficient certainty to enable the source may be identified. My view in relation to the source of the information being identified is supported by the view of the English Court of Appeal in **Consolidated Contractors International v Masri**. In that case, the affidavit of the appellants had stated:

> As part of this search the enquiry agents searched for documents which had been discarded by [the companies]

> and which might assist Mr Masri in enforcing the Judgment Debt. In particular, they searched the documents discarded as rubbish on the pavement outside the London offices of [the companies]. I understand where they identified documents which might be relevant they made copies of those documents and returned the originals to the refuse sacks outside [the companies'] offices. The enquiry agents have confirmed to me that they have used these methods of obtaining documents for use in court proceedings on several other occasions before and that their conduct has not been criticised by the court when the means of obtaining the documents have been disclosed. I say this on the basis of information provided to me by the relevant enquiry agents, which I believe to be true.

The court was later asked to make an order which in effect ordered that the appellants identify the individual or individuals in the enquiry agents that provided the deponent with the information set out in the paragraph quoted above and the name of the firm of enquiry agents for whom the individual(s) worked.

[36] The court stated that the aim of provisions of the English Practice Direction that are similar to our rule 30.3(2)(b)(ii) is to ensure that a person against whom serious allegations are being made can identify the source of any information or belief that is not within the deponent's own knowledge so that the facts deposed to on the basis of information or belief can be investigated. If the source is a person, that person must, save in exceptional cases, be identified with sufficient certainty to enable the person against whom the affidavit is directed to investigate the information or belief in accordance with the rules of court or other relevant legal principles. The court went on to hold that the name of the person ought to have been disclosed. It was my view that the general principle to be gleaned from **Consolidated Contractors International** is that sufficient precision must be given to enable the identification of the source of the information. I did not understand the court to impose a mandatory requirement for the naming of the

persons in every case, save for confidentiality. However, in the circumstances of the application being made, the court was of the view that the names of these persons should be disclosed.

[37] I came to the view that even though Mr Chin had not preceded the evidence as to the circumstances leading up to the accident by the words "I am informed and believe", that it was clear from the affidavit of Mr Chin that Mr Chin did not purport to have personal knowledge of the events leading up to the accident. It was clear to me that his knowledge of the events came from the 2nd defendant's report. The 2nd defendant was the driver, who was named and pleaded as same by the claimant in his particulars of claim and therefore the claimant was aware of the identity as well as the name of the source of Mr Chin's information. So that even if **Consolidated Contractors International** is to be understood as laying down a mandatory requirement for the naming of the source of the information, this was satisfied. I therefore concluded that the requirement of rule 30.2(3)(b)(ii) had been satisfied.

[38] The case of **Fancourt v Mercantile Credits Ltd** is distinguishable. In that case, the High Court of Australia in considering an appeal against the grant of summary judgment and found that the affidavits filed by the appellants did not go the whole distance in establishing that they had a good defence. In that case, by the relevant rule "the appellants were obliged, if they were to show cause, to state the sources and grounds of their belief". The court found that the appellant had stated their belief that they ahd a good defence to the respondent's claim but the "particularity of that defence" was confined to "a denial". The same cannot be said to be true of this case where the 1st defendant has identified with sufficient certainty the source of his information and has set out with sufficient particularity the events leading up to the accident.

[39] I came to the view that the evidence as to how the accident occurred as outlined in the affidavit of Mr Chin, and which is reflected in the exhibited draft, disclosed a real prospect of successfully defending the claim in that this is a matter that would have to be ventilated at trial for the court to determine which account to believe; and if the 2nd defendant's account is accepted, the 2nd defendant would

not have been negligent as he would have been proceeding through the traffic lights when the light was on green.

[40] I was also of the view that the other requirements had been satisfied. With respect to the requirement for giving a good reason for failing to file the acknowledgment of service or defence in time, the reason given was that the 1st defendant was not aware of the claim until November 2021 when it was contacted by its insurer. I concluded that this was a good reason because if the 1st defendant was not aware of the claim, it could not have filed any documents in relation thereto. Where the issue of whether the 1st defendant applied as soon as reasonably practicable after learning of the application is concerned, the delay was a period of 1 month. I was of the view that in circumstances where the documents had to be forwarded to external counsel and instructions to be given for the defence, this was not an inordinate period of time and it could not be said that it was not reasonably practicable after finding out about the application.

[41] Although I considered the application to set aside the default judgment, I did not think it appropriate to make an order setting aside a judgment that had not been entered but that it would be more appropriate to make similar consequential orders that are required to be made when the default judgment has been entered and set aside. Consequently, I granted an extension of time to file the defence.

[42] It was for these reasons that I made the orders stated at paragraph 3.