IN THE SUPREME COURT OF JUDICATURE OF JAMAICA Judgment Book

IN THE CIVIL DIVISION

CLAIM NO HCV 03133 of 2004

IN CHAMBERS

BETWEEN	**CAROLYN JOBSON**	CLAIMANT
AND	**WHISTLING BIRD IN NEGRIL**	1st DEFENDANT
AND	**JIM BOYDSTON**	2nd DEFENDANT

Ms. Davis instructed by Diane Jobson for the Claimant.
The 1st Defendant, not being a legal entity, was unrepresented.
Mr. Ian Wilkinson and Ms. Shawana Grant instructed by Ian Wilkinson and Co. for the 2nd Defendant.

June 23 and 27, 2008 - July 1, 2008

McINTOSH M. , J.

[1] On December 21, 2004, the Claimant brought a claim against the Defendants for injuries which were sustained while staying as a guest at the Whistling Bird in Negril, a hotel owned by the 2nd Defendant.

[2] The 2nd Defendant filed an acknowledgement of service on the 20th June 2005 but neglected to file a defence. A judgment in default of acknowledgement of service and defence was entered against the Defendants, however the order was incorrectly dated as the 26th day of April, 2004. The 2nd Defendant now applies to set aside the default judgment.

[3] The issues to be resolved by the court are:

1. Whether (1) the fact that the acknowledgement of service was filed or (2) the fact that the judgment was dated incorrectly rendered the default judgment irregular and
2. If no, to question 1, whether the 2nd Defendant has satisfied the requirements of rule 13.3 of the Civil Procedure Rules (CPR) concerning setting aside default judgments.

Evidence and Submissions

[4] Mrs. Jobson claims that on September 8, 2001 while seated on the bed in her hotel room, the Night Heron, the ceiling fan came loose and fell unto her head thereby causing injury to her mouth, teeth, neck and shoulders. She further claims that Frances Johnson, whom she was advised was the most senior person at the hotel at the time of the incident (since the Assistant Manager, Ms. Arlene Samuels, was off duty), acknowledged that the ceiling fan had fallen on her and caused injury and admitted liability for the accident in a letter dated September 9th, 2001. In support of her assertions Mrs. Jobson filed the affidavit of her husband, Anthony Wisdom, who was staying with her at the cottage. In his affidavit Mr. Wisdom states that "he requested that the hotel sign a letter admitting liability for the injury of his wife and Ms. Johnson signed a letter dated the 9th September 2001 and he witnessed her signature".

[5] The Claimant also submits that given that the relevant provision is Rule 13.3 of the CPR the 2nd Defendant has not shown that the application to set aside default judgment was made as soon as reasonably practicable after finding out that judgment was entered as the Affidavit of Jim Boydston states at paragraph 7 that he became aware of the judgment in "late 2006", however, the application to set aside judgment was only made in June 2007. Further Mrs. Davis, relying on *Ramkissoon v Olds Discount Co. (TCC) Ltd.* (1961) 4 WIR 73, submitted that the 2nd Defendant is required to put forward facts on which the

court can determine whether he has a real prospect of successfully defending the claim and he has not done so.

[6] With respect to the date on the default judgment Ms. Davis, on behalf of the Claimant, submitted that it was clearly a clerical error because the date on the judgment, the 26th day of April 2004, is before the claim was even brought before the court. She pointed out to the court that the error can be corrected under the Rule 42 (10) in the CPR which empowers the court to correct such errors.

[6] The 2nd Defendant submitted that the default judgment was wrongly entered because:

a. the default judgment was for failure to acknowledge service and to file a defence and an acknowledgment of service was in fact filed

b. the Claimant failed to prove service and therefore did not comply with the provisions of Part 12.4 of the CPR

c. the default judgment was dated April 26th, 2004, a date before the claim was filed and

d. the 2nd defendant is referred to in the claim as Jim Boydston, when his name is in fact James Boydston

[7] Further, the 2nd Defendant, in his affidavit dated the 15th June, 2007 claims that he has a real prospect of succeeding in the claim because the chief document being relied upon by the Claimant (the letter with Ms. Johnson's signature) is a forgery and that in any event Ms. Johnson was not authorized to accept liability on behalf of the Hotel. In support of their assertion of a forged letter the 2nd Defendant tendered the affidavit of Ms. Johnson who avers at paragraph 9 that she only recalls signing a document that was on plain paper with only two or three lines written on it and that the document she signed only acknowledged that a complaint had been made.

[8] Finally, the 2nd defendant claims that the delay in applying to set aside the judgment was out of his control as he was in the United States of America attending to his sick wife and was unable to fully instruct his attorneys. Further he had changed attorneys and the new attorneys-at-law had difficulty obtaining the relevant witness statements and documents.

The Law

[9] The current matter must be considered pursuant to Rule 13.3 of the Civil Procedure Rules which states:

" (1) The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.

(2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:

(a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered;

(b) give a good explanation for the failure to file an acknowledgment of service or a defence, as the case may be.

(3) Where this rule gives the court power to set aside a judgment, the court may instead vary it."

[10] Thus, in Jamaica the sole question in determining whether a default judgment should be set aside is whether there is a real prospect of successfully defending the claim. In *Blair v Hyman & Co. and Hyman* , Unreported, C.L. No. 2005 HCV 2297 (delivered May 16, 2008) Brooks, J. at page 4 adopts the definition provided in the Civil Procedure 2003 (The White Book) as a working

definition of the phrase 'real prospect of successfully defending the claim'. It reads at paragraph 13.3.1:

> "The phrase...reflects the test for summary judgment...it is not enough to show and "arguable defence".

Further paragraph 24.2.3 states:

> *"it is sufficient for the (defendant) to show some "prospect", i.e. some chance of success. That prospect must be real, i.e. the court will disregard prospects which are false, fanciful or imaginary. The inclusion of the word "real" means that the (defendant) has to have a case which is better than merely arguable...The (defendant) is not required to show that his case will succeed at trial"*

(See also *Raymond Clough v Janet Mignott*, Unreported HCV 2913 of 2004 decided April 27, 2007 and *Harris v Fyffe and Lopez Gordon*, Unreported HCV 2562 of 2005, decided July 30, 2007)

[11] Sykes, J. in *Saunders v Green et. al.*, unreported HCV 2868 of 2005 (decided February 27, 2007) stated that real prospect is not 'blind or misguided exuberance'. He cited Lord Justice Potter, at paragraph 10, in *ED & F Man Liquid Products v Patel & ANR* [2003] C.P. Rep 51 who opined:

> *"However, that does not mean that the court has to accept without analysis everything said by a party in his statement before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable"*

Thus while a mini-trial is not to be conducted, "that did not mean that a defendant was free to make any assertion and the judge must accept it" (See paragraph 22, Sykes, J).

[12] With regard to correction of errors in judgments or orders Part 42.10 of the CPR reads as follows:

"(1) The court may at any time (without an appeal) correct a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission.

(2) A party may apply for a correction without notice"

Did (1) the fact that the acknowledgement of service was filed or (2) the fact that the judgment was dated incorrectly render the default judgment irregular.

[13] Rule 9.3(4) of the CPR states that an acknowledgment of service may be filed at any time before a request for a default judgment is received at the registry out of which the claim form was issued. Thus, the acknowledgment of service was filed in time, pursuant to the CPR. Therefore, the judgment so far as it pertains to failure to acknowledge service was wrongly entered.

[14] The above finding, however, does not negate the entire judgment or make it irregular. In the circumstances the interlocutory judgment of the court was made in default of acknowledgement of service AND in default of defence. The fact is that a defence was never filed. Pursuant to Rule 12.5, the claimants were entitled to request a default judgment and the registry was obliged to enter a judgment in default of defence because an acknowledgment of service was filed (indicating that the claim had been received), the period for filing the defence had long passed and at the time there was no application for an extension of the time. In the circumstances the fact that a default judgment was wrongly entered with regard to the acknowledgment of service does not disentitle the claimant from benefiting from the judgment in default of defence because the latter was also specifically mentioned in the judgment. The judgment for failure to defend was therefore properly entered.

[15] With regard to the error regarding the date of the default judgment, it seems clear that a clerical error had been made. Obviously, the request would not have been made on the stated date (April 26, 2004) which is prior to the date of the claim. Rule 42.10 is applicable and the document should be taken as being dated the 26th day of April, 2006 (which in fact corresponds with the date the document was filed).

We may now move on to the second issue - *Has the 2nd Defendant satisfied the requirements of rule 13.3 of the Civil Procedure rules concerning setting aside default judgments?*

[16] The simple answer to this is that he has not. The Defendant has made the bold assertion that the Claimant has placed a forged letter before the court, thereby accusing the Claimant of an act of illegality. Mr. Boydston has brought no proof of such a forgery. Ms. Johnson's affidavit states that the document which she signed only had three or four lines written on a blank sheet, yet this document has not been placed before the court. Thus beyond Ms. Johnson's denial of signing the letter in evidence, there is no proof of forgery. The only document before the court is the letter dated September 9, 2001 which bears Ms. Johnson's signature and Mr. Wisdom's signature as witness.

[17] Further, at the very least, Ms. Johnson's own affidavit confirms that the Claimant was at the hotel at the material time and that she had made a complaint to her regarding her injury. There has been no evidence from the Defendant to rebut the claim that the ceiling fan fell from the ceiling onto the claimant's head. This assertion is therefore accepted as fact. One is therefore constrained to the inference that the fan was not properly attached to the ceiling.

[18] I am unable to accept the submission that the attorneys applied to the court as soon as was reasonably practicable and that there was a good explanation reason for failure to file a defence. The Notice of Change of Attorney at Law was filed on February 7, 2006, approximately a month before default judgment was entered. During this time, had the 2nd Defendant filed a defence he would not have been out of time. While I appreciate that caring for a sick relative is emotionally taxing, surely counsel would have explained to Mr. Boydston the seriousness of the claim and the absolute requirement to act expeditiously, particularly in light of the rules governing the court. Further, in this age of technology it would have been very easy for the Defendant to communicate with counsel on the matter, even though he was out of the jurisdiction.

Conclusion

[19] The 2nd Defendant has failed to show that he has a real prospect of successfully defending the claim if he should be allowed to proceed to trial as he has not presented the facts on which he rests his assertions.

[20] The application to set aside judgment must be refused.

[21] I therefore make the following orders:

1. Application to set aside default judgment and for leave to file a defence is refused.
2. Application for court order to amend the date of the default judgment is granted.
3. The Claimant is at liberty to apply for damages to be assessed.
4. Costs to the Claimant.
5. Leave to appeal granted