Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1995/M439

BETWEEN	PHILLIP McCALLA	PLAINTIFF
AND	MICHELLE TULLOCH	DEFENDANT

Mr. C. Samuda for Plaintiff instructed by Piper and Samuda

Mr. B. Samuels and Mr. C Gangasingh for Defendant instructed by Knight, Pickersgill, Dowding and Samuels.

IN CHAMBERS

SUMMONS TO SET ASIDE JUDGMENT

HEARD: JUNE 19, 1996; SEPTEMBER 30, 1996.

KARL HARRISON J.

This summons seeks to set aside an interlocutory judgment in default of defence and appearance which was perfected on the 11th December 1995 and entered in Binder No. 704 Folio 347 of the Judgment Binder in the Supreme Court. The records also disclose that a Writ of Seizure and Sale was issued to the Bailiff on the 11th March, 1996 in respect of the said judgment.

The action to which this judgment relates, concerns a claim for goods sold and delivered. The statement of claim alleges:

> "1. The plaintiff's claim is against the defendant for the sum of Fifty-Three Thousand Dollars ($53,000.00) being the amount due and owing to the plaintiff by the defendant in respect of goods sold and delivered to the plaintiff at her request.
>
> 2. Full particulars of the debt have already been furnished to the defendant and by letter dated the 28th August, 1995 the defendant admitted the debt."

Mr. Samuels submitted that there were special circumstances in this case and explained that no draft defence on the merits was filed because the defendant was "starved of the opportunity to be given particulars to enable

her to plead". According to him, the defendant was unsuccessful in her request of the plaintiff for further and better particulars. In response to the request, Piper and Samuda, Attorneys-at-Law for the plaintiff, had stated in a letter dated the 14th November 1995, and exhibited by the defendant that:

> "All relevant documents have already been furnished to your client who, in writing, admitted to having received the same and the debt now being claimed.
>
> In the foregoing, we view with disquiet your request for further and better particulars and are instructed not to accede or forebear."

Mr. Samuels has also pointed out that a summons for further and better particulars was filed on the 27th December 1995 in the Registry of the Supreme Court. I have observed however, from the records, that up to the time of hearing this application, no date had yet been fixed by the Registrar of the Supreme Court for the hearing of that summons.

Mr. Samuels contended therefore, that the substance of the defence was reflected in paragraph 10 of an affidavit sworn to by the defendant and accordingly, the judgment in default ought to be set aside. The material paragraphs of the defendant's affidavit are as follows:

> "5. That the statement of claim specially endorsed on the writ of summons did not disclose the particulars of an alleged loan and I was told by my Attorneys and I verily believe that they sought to obtain from the plaintiff further information regarding the goods sold and delivered along with copies of receipts to the plaintiff and I exhibit herewith a copy of letter addressed to the plaintiff's Attorneys dated November 10, 1995 for the said further and better particulars.....
>
> 6. That I was told by my Attorneys and I verily believe that the plaintiff's Attorneys responded to my Attorneys by letter dated November 14, 1995 and I exhibit herewith the said letter marked "MT2" for identification.
>
> 7. That I was told by my Attorneys and I verily believe that they applied to the Supreme Court for Further and Better Particulars by summons dated the 27th day of December 1995.....
>
> 8. That I was informed by my Attorneys and verily believe that final judgment was entered against me by the plaintiff's attorneys on the 19th day of October 1996(sic) and served on my Attorneys on the 13th day of March 1996.
>
> 9. That I was given no chance to give my Attorneys instructions to file a defence.
>
> 10. That I have a good defence to this action in that the amount sued for is much in the excess of the amount owed to the plaintiff.
>
> 11. Wherefore I humbly pray this Honourable Court will grant me an Order for leave to file and serve my defence out of time."

In response to the submissions made by Mr. Samuels, Mr. Samuda submitted that since the judgment was regularly obtained the applicant must by way of affidavit evidence illustrate that there is merit to the defence which was proposed to be adduced and that it must disclose that there is a triable issue. He further submitted that there was no affidavit of merit before the court and that the defendant's affidavit seemed to indicate that the only basis on which she prayed to set aside the judgment was that she had been sued in excess of what she owed. He invited the court to look at the history of the matter and to find that the defendant had been dilatory in pursuing the application for further and better particulars. He strongly contended therefore, that the defendant's summons ought to be dismissed with costs to the plaintiff.

Now, section 258 of the Judicature (Civil Procedure Code) Law states:

> "Any judgment by default, whether under this title or under any other provisions of this Law, may be set aside by the Court or Judge upon such terms as to costs or otherwise as such court or judge may think fit."

The Court or Judge therefore has discretionary power when it comes to the setting aside of default judgments. In Evans v Bartlam (1937) 2 All E.R. 646, Lord Atkin stated inter alia:

> "I agree that both RSC Ord. 13 r. 10 and RSC Ord.27 r. 15 give a discretionary power to the Judge in Chambers to set aside a default judgment. The discretion is in terms unconditional. The Court have, however, laid down for themselves rules to guide them in the normal exercise of their discretion. One is that, where the judgment was obtained regularly, there must be an affidavit of merits meaning that the applicant must produce to the court evidence that he has a prima facie defence... .... the principle obviously is that, unless and until the Court has pronounced a judgment upon the merits or by consent it is to have power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure."

It is quite evident then, that an applicant who is seeking to set aside a judgment which has been regularly obtained as it is the case here, must illustrate by evidence, that is, affidavit evidence that there is merit to the defence the applicant wishes to file. Furthermore, the affidavit evidence must disclose that there will be a triable issue at stake.

What is the defendant saying in relation to her defence in the instant case? At paragraph 10 of the affidavit in support she deposes:

> ".... I have a good defence to this action in that the amount sued for is much in excess of the amount owed to the plaintiff."

What I have gathered however, from the submissions made by Mr. Samuels, is that the defendant is unable to file this defence because she is unable to obtain further and better particulars of the plaintiff's claim. To begin with, the statement of claim has disclosed that this action is one in respect of goods sold and delivered at the defendant's request. The defendant has not joined issue in her affidavit evidence in relation to these allegations. Furthermore, paragraph 2 of the statement of claim has alleged that full particulars of the goods sold and delivered were already furnished to the defendant and that the defendant has by letter dated 28th August, 1995 admitted the debt. Neither has the defendant addressed this issue in her affidavit evidence so, it is deemed to be admitted as far as the rules of procedure are concerned.

I do agree with Mr. Samuda that the defendant having deposed in her affidavit that the amount she has been sued for is in excess of the amount she claims is owing, definitely shows that the defendant knows quite well the case she has to present. I further agree with Mr. Samuda therefore, that it is quire untenable for Mr. Samuels to say that because of the failure to supply particulars that the defendant has been denied an opportunity to present her defence.

I further agree with Mr. Samuda, that it cannot "lie in the mouth" of the defendant, having regard to the claim and the judgment which had been regularly obtainted, to say that as a result of the failure of the plaintiff's attorneys to furnish particulras requested, that she is in a difficulty in moving the court on affidavit evidence to set aside the judgment.

But there is one other aspect of the application which must be considered. This concerns the summons for further and better particulars which the defendant says a request was denied by the plaintiff, hence an application had to be made to the Court. This application was filed as far

back as the 27th day of December 1995 but no date has been set by the Registrar for the hearing of that summons. The defendant has not disposed in her affidavit before me why a date has not yet been fixed. All she says at paragraph 7 is that she was informed by her Attorneys that they had applied. To my mind, the plaintiff has been dilatory. These are particulars, which are said to be necessary in order to allow the defendant to plead, yet, she has sat back and has made no attempt to obtain a date for the hearing of this summons. The defendant has clearly in my view shown a lack of seriousness on her part.

I hold that there is no affidavit of merit before me. I am not disposed therefore to exercise my discretion in setting aside the judgment in default of appearance and defence. The summons is dismissed with costs to the plaintiff to be taxed if not agreed.