[2024] JMSC Civ 46

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020CV04630

BETWEEN	**OSBOURNE PALMER**	**CLAIMANT**
AND	**RICHARD BURKE**	**1ST DEFENDANT**
AND	**ADRIAN NEIL**	**2ND DEFENDANT**

IN CHAMBERS

Ms Suzette Campbell instructed by Burton Campbell and Associates for the Applicant/ 1st Defendant.

Ms. Ayana Worgs instructed by Jacobs Law for the Claimant/Respondent.

Heard: 4th and 12th April 2024

Application to set aside default judgment- hearsay evidence- Rules 13(3) -13(4) and 30(3) of the Civil Procedure Rules 2002

L. SHELLY WILLIAMS, SPJ (AG)

Background

[1] The Claimant filed a Claim Form and Particulars of Claim on the 26th of November 2020 against the first defendant who was the owner of a motor vehicle, which was being driven by the second defendant. The claim is for negligence where the Claimant is seeking damages and special damages stemming from a collision that occurred on the 8th of June 2020 between the claimant's and the first defendant's vehicle. The First Defendant was served with the Claim Form, Particulars of Claim and the accompanying documents on the 6th of January 2021; however, the

Second Defendant was not served within the stipulated time. No acknowledgement of service, nor defence was filed by the First Defendant.

[2] On the 5th of March 2021 the Claimant requested and was granted a default judgment against the First Defendant. The default judgment was served on the Applicant/ First Defendant on the 11th July 2023. On the 31st of August 2023 the First Defendant filed an application along with an affidavit in support to set aside the default judgment. The application sought from the court orders to:

a. Set aside the default judgment.

b. Extend time to file the defence of the first defendant.

c. Be granted 14 days from the hearing of the application to file the defence of the first defendant.

d. Cost be cost in the claim.

[3] The Claimant filed an affidavit and submissions in response in which he urged the court to dismiss the application.

Applicant's submissions

[4] Counsel for the applicant acknowledged the applicant had received the Claim Form and the Particulars of Claim but had failed to file an acknowledgment of service. The excuse advanced by the applicant for the failure was that he unaware as to what steps he was to take regarding these documents. The applicant did bring the documents to the attention of the insurance company, but took no further steps in the matter, until he was served with the default judgement, along with the accompanying documents.

[5] The affidavit filed by the Applicant indicated that he had not been present on the scene at the time of the accident, however, sought to place before the court a different account of the events leading to the collision based on what he told by the second defendant and verily believed. Counsel for the applicant relied on rule 13.3

of the Civil Procedure Rules 2002 (CPR) to advance her application for the setting aside of the default judgment. Ms Campbell submitted that although the affidavit evidence did contain hearsay evidence, that this was permissible at the interlocutory stage. Counsel for the applicant relied on rule 30. 3 in support of this position.

[6] Ms Campbell argued that her client had a real prospect of success, and that although there had been a delay in filing the acknowledgement of service and defence, the first defendant had an explanation for the delay.

Claimant's submission

[7] Counsel for the Claimant detailed to the court that this a default judgment that was regularly issued by the court as the applicant had failed to file. an acknowledgment of service after being served with the documents. Ms. Worgs' submission was that the affidavit presented to the court was based on hearsay, and there was no evidence of merit presented to the court that could be relied upon to set aside the default judgment.

[8] Ms Worg's position was that there had been a delay by the First Defendant in filing this application, which was compounded by his long unexplained delay in filing an acknowledgment of service, which was inexcusable. Counsel also relied on rule 13.3 and urged the court not to set aside the default judgment.

Analysis

[9] Rule 13.3 of the CPR allows the court to set aside default judgments provided the applicant satisfies certain conditions. Rule 13.3 states that:

> *(1) The court may set aside or vary a judgement 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) given a good explanation for the failure to file an acknowledgement 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. (Rule 26.1(3) enables the court to attach conditions to any order.

[10] There have been several cases where the court has opined on the approach to be taken in interpreting rule 13.3. In the case of **Merlene Murray-Brown v Dunstan Harper** [2010] JMCA App 1 Phillips JA opined at paragraph 23 of her decision that:

> *Rule 13.3 of the CPR governs cases, as its sub title suggests, where the court may set aside or vary default judgments. In September 2006, the rule was amended and there are no longer cumulative provisions which would permit a "knock-out blow" if one of the criteria is not met. The focus of the court now in the exercise of its discretion is to assess whether the applicant has a real prospect of successfully defending the claim, but the court must also consider the matters set out in 13.3(2) (a) & (b) of the rules.*

[11] In assessing whether the defendant has a real prospect of success Lord Woolf in the case of **Swain v Hillman** [2001] 1 All ER 91sought to clarity to the phrase and opined that:

> *"The words, "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word „real" distinguishes fanciful prospects of success or…. directed the court to the need to see whether there was a "realistic" as opposed to a "fanciful" prospect of success."*

[12] The First Defendant has averred in his affidavit and later in his draft defence to the claim that it is the Claimant who was negligent in his driving which caused the collision. By proffering this defence, the First Defendant has advanced another version of the events that led to collision. The difference between the two versions would have to be resolved by a trial judge. This defence would have a real prospect of success as it is realistic as opposed to be fanciful.

[13] There is further clarification given in the procedure to be adopted in setting aside default judgments in Rule 13.4 which states:

> *(1) An application may be made by any person who is directly affected by the entry of judgment.*
>
> *(2) The application must be supported by evidence on affidavit.*

(3) The affidavit must exhibit a draft of the proposed defence.

[14] In **Evans v. Bartlam** [1937] A.C. 473, Lord Atkins at page 480 of his decision stated that

> *"Where the judgement was obtained regularly there must be an affidavit of merit, meaning that the applicant must produce to the Court evidence that he has a prima facie defence."*

The evidence enclosed in an affidavit to set aside a default judgment must encapsulate the facts that would give rise to the first defendant having a real prospect of success.

[15] In the case of **Joseph Nanco v Anthony Lugg and B&J Equipment Rental Ltd** [2012] JMSC 81 (Nanco) McDonald-Bishop J as she then was, having assessed the affidavit of the applicant opined at paragraph 69 of the judgment that:

> *"…The rule in 13.4 is clear that the application to set aside must be supported by affidavit evidence and the draft defence must be exhibited. The draft defence must reflect the facts on which the defendant is seeking to rely as set out in evidence."*

[16] The affidavit which details the First Defendant's version of the collision comes entirely from what was told to him by the driver of his motor vehicle i.e. the second defendant. This begs the question as to whether an affidavit that consists almost entirely of hearsay, can be deemed to be an affidavit of merit. In response to this question the applicant sought to rely on rule 30.3 which states that;

> *(1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.*
>
> *2) However an affidavit may contain statements of information and belief –*
>
> *a) where any of these Rules so allows; and*
>
> *b) where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates-*

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 for any matters of information and belief.

[17] This application is being made at the interlocutory stage and as such the law allows for hearsay evidence to be presented to the court once it indicates the source of this evidence. The affidavit of the first defendant has satisfied rule 30.3 of the CPR as it indicates the source of his information as well as his belief in the information.

[18] There have several cases that have urged the court at the hearing of an application to set aside a default judgment that the court ought not to embark on a mini trial. The gravamen of the application is whether the applicant has a real prospect of success. Since there are two versions of the events leading up to the collision, as well as a dispute as to the person or persons responsible for the collision, I find that the Applicant has satisfied the prerequisites under rule 13.3 in that he has a real prospect of success.

[19] I then turn to the issue of delay. In this case, there was a period of three years and two months between the time the applicant was served with the Claim Form and the Particulars of Claim and when he applied to set aside the default judgment. The Applicant on receiving the default judgment filed his application to set aside within a 2-month period.

[20] In **Sasha Gaye Saunders v Michael Green et al** Claim No 2005 HCV 2868, judgment delivered 27 February 2007, Sykes J. (as he then was), expressed, as follows, in paragraph 14:

> *"Using August 4, 2006, as the date of knowledge, the application to set aside was made quite late. The time lapse between August 4, 2006 and October 6, 2006, is too long to be ignored. In the modern era of civil litigation where there is much emphasis on speed and efficiency, that time lapse is inordinate. It is reflective of a culture of lassitude and sluggishness, the implacable enemies of the new ethos propounded by the new rules."*

[21] I agree with the pronouncements of Sykes (as he then was). He was of the considered opinion that a period of 3 months between being made aware of the

judgment and applying to set aside same was too long. In the instant case however, given that the applicant acted within two months, I find that there was no real delay between the time of the receipt of the default judgment and the application to set aside.

[22] There was, however, a long delay between the time the Claim Form and the Particulars of Claim was served and the time an Acknowledgment of Service ought to have been filed. The applicant had averred that he had received the documents, however he was unaware as to what to do with them. I find this reason to be remarkable for the following reasons:

a. The applicant, who is a teacher, was served with

i. Notice to the defendant.

ii. Prescribed notes for the defendant.

iii. A copy of an acknowledgment of service

iv. Defence.

[23] These documents were attached to the Claim Form. The Notice to the Defendant stipulates the time period in which an Acknowledgment of Service must be filed. The Prescribed Notes for the Defendant also gives instructions and time lines for the filing of the Acknowledgment of Service, along with instructions on the filing of a Defence.

[24] Despite this delay, the Courts have adopted a more lenient approach to litigants who have been delinquent in filing their requisite documents once they have demonstrated in their draft defence and their evidence that they have a real prospect of success. In the case of **Peter Haddad v Donald Silvera** SCCA No 31/2003, Motion No 1/2007, judgment delivered 31 July 2007, Smith JA, at page 12-13, stated that:

> *"As has been already stated, the absence of a good reason for delay is not in itself sufficient to justify the court in refusing to exercise its discretion to grant an extension. But some reason must be proffered... The guiding principle which can be extracted [Hashtroodi v Hancock [2004] 3 All ER(D) 530] ...is that the court in exercising its discretion should do so in accordance with the overriding objective and the reason for the failure to act within the prescribed period is a highly material factor."*

[25] A similar approach was taken in the case of **The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr (a minor) by Rashaka Brooks Snr (his father and next friend)** [2013] JMCA Civ 16, in which Brooks JA (as he then was) opined at paragraph 32 of the judgment that:

> *We do not regard the explanation for the delay as inadequate and lacking in credibility. Miss Chisholm attributed the initial delay to administrative oversight in her chambers. Such oversight has, more than once, been excused in these courts on the basis that a deserving litigant ought not to be shut out because of an error by his attorney-at-law. It is usually when the behaviour is grossly negligent that the litigant's position is imperilled. We do not regard this as grossly negligent behaviour. In addition, Miss Chisholm's efforts to secure the required instructions are credible and she has given a time for the completion of that exercise.*

[26] I find that there was no real delay between the time of the receipt of the default judgment and the application to set aside. There was a delay of over two years between the time the Claim Form and Particulars of Claim were served and the time the Acknowledgment of Service should have been filed. I do not find however that it amounts to grossly negligent behaviour.

[27] In addition, I have noted that the Claimant has not indicated whether he would incur any real prejudice in the event the default judgment is set aside. In light of this I will set aside the default judgment.

[28] Order

1. The default judgment entered on the 5th March 2021 is set aside.

2. The applicant is granted 14 days within which to file his defence.

3. Cost to the Claimant to agreed or taxed.