[2015] JMSC Civ. 220

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2013HCV 03010

BETWEEN	**LESLIE POWELL**	**CLAIMANT**
AND	**ANDREW VIRGO**	**1ST DEFENDANT**
AND	**CHRISTOPHER FULTON**	**2ND DEFENDANT**

Ms. Deidre Coy instructed by Deidre Coy and Co. for the Claimant
Ms. Lorraine Moore instructed By Dunbar and Co. for 1st and 2nd Defendants.

Civil Procedure - Application to set aside default judgment - CPR Rule 13.2-CPR Rule 13.3 - Application to set aside irregularly obtained judgment - Applicant also relying on CPR Rule 13.3 - Tests to be applied in either situation - Whether judgment should be set aside.

Heard: 20th April, 16th June and 11th November, 2015

Bertram Linton, J (Ag.)

[1] Mr. Leslie Powell is adamant that the default judgment entered against the first defendant Andrew Virgo should stand as properly entered. Mr. Virgo asserts that it should not be maintained, as he was not personally served and if service is upheld as valid in any event he has a real prospect of successfully defending the claim.

[2] Mr. Powell is extremely annoyed and the reason is clear based on the turn of events I am about to describe. On the 25th August, 2011, Mr. Powell alleges that he was on the side walk along Henley Road in Kingston when the 2nd defendant drove Mr. Virgo's car, and collided with him, knocking him to the ground and causing various

injuries and loss. He consulted his attorney, who submitted a claim to Mr. Virgo's insurance company, when no satisfactory resolution was forthcoming he filed this claim on the 16th May 2013 outlining the incident and seeking damages. Mr. Virgo's first contention is that he was never personally served as provided for by the CPR Rule 5.1 because the documents were given to a neighbour who later handed them to him.

CPR Rule 5.1(1) Says

> "*The general rule is that a claim form must be served personally on each defendant"*

[3] He was never personally served and says by virtue of this, that the Judgment was irregularly entered and that the provisions of CPR Rule 13.2 should apply.

CPR Rule 13.2 is headed

> *"Cases Where Court must set aside default judgment"*
>
> *13.2 (1) The court must set aside a judgment entered under Part 12 if judgment was wrongfully entered because –*
>
> *a) in the case of a failure to file an acknowledgment of service, any conditions in Rule 12.4 was not satisfied;*
>
> *b) in the case of judgment for failure to defend, any of the conditions in rule 12.5 as not satisfied; or*
>
> *c)…*

Part 12 deals with default judgments. Part 12.4(a) and Part 12.5(a) deal with proof of service in relation to failure to file Acknowledgment of Service and Defence respectively.

[4] The first issue for us to address then is whether or not there was an irregularity in service consequent upon which the court **MUST** set aside the default judgment as wrongly entered.

[5] Mr. Virgo's attorney filed an acknowledgment of service on March 6, 2014. This document says he received the documents sometime in July 2013. He says that he took the documents to his insurance company, "upon receiving the said documents" (Affidavit in support of this application filed on July 25th, 2014) yet there is no

explanation why no acknowledgment was filed until March of the next year. It is noteworthy too that the acknowledgment has in bold block letters;

> ***"DOCUMENTS WERE LEFT AT THE HOUSE OF A WOMAN WHO LIVES IN THE DEFENDANT'S NEIGHBOURHOOD AND HANDED TO HIM SOMETIME IN JULY 2013"***

[6] It is all the more surprising then, that even though the Acknowledgment of Service was extremely late and bearing in mind the boldly declared allegation of the breach in service that the defendant waited another four months to file this application challenging the service of the documents.

CPR Rule 9.6 was open to the defendant from the time he handed the documents to his insurance company and instructed them as to his issues with service.

Rule 9.6 says;

Procedure for disputing court's jurisdiction, etc

> *1. A defendant who:*
>
> *a) disputes the court's jurisdiction to try the claim; or*
>
> *b) argues that the court should not exercise its jurisdiction, may apply to the court for a declaration to that effect.*
>
> *2. A defendant who wishes to make an application under paragraph (1) must first file an acknowledgment of service.*
>
> This must be done while the 42 days allotted for filing the defence is running.
>
> The objection not having been taken CPR Rule 9.6(5) provides;
>
> *"A defendant who-*
>
> *(a) files an acknowledgment of service; and*
>
> *(b) does not make an application under this rule within the period for filing a defence, is treated as having accepted that the court has jurisdiction to try the claim.*

[7] The court therefore concludes that the defendant not having taken advantage of the provision for disputing the jurisdiction of the court in the time allowed and even after filing its acknowledgment out of time, was not diligent about availing themselves of the provision, so must be deemed to be held to service on the terms which it was made.

[8] In addition it would seem that the defendant may be merely seeking a procedural advantage in the raising of this issue, albeit out of time. This is bolstered by the undisputed assertions that the claimant makes in affidavits filed by Christopher May and Richard Wint, persons who attempted to serve the documents on the first defendant. Mr. May says he went to the first defendant's home and spoke to his mother about the documents for her son, she called him on the phone and after communicating the reason for his visit both the mother and Mr. Virgo became hostile and refused to accept the documents .Service was once again attempted by Mr. Wint, who spoke to the neighbour who knew the first defendant well and who we are now well aware, did give the documents to Mr. Virgo as promised .Also a defence was filed at the same time as the acknowledgment, which seeks to address the merits of the claim. Mr. Virgo's denial of personal service then comes with a healthy dose of disingenuity.

[9] I adopt the reasoning in **Joseph Nanco v Anthony Lugg, et al [2012] JMSC Civ, 81 at paragraph 44 where** McDonald Bishop, J says;

> *"… a defendant by entering an appearance in an action (which would be tantamount to acknowledgment of service under the new procedural regime) without protest and/or by taking active part in the proceedings ought not to be allowed to assert that he was never served with the process by which the claim was brought"*

[9] The defendant having acknowledged (out of time) also filed a defence on 6th March 2014 (out of time) which seeks to address the merits of the claim and also desires to move the court in respect of the criteria under CPR Rule 13.3.
Rule 13.3 provides;

(1) The court may set aside or vary a judgment entered under part 12 if he 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 id reasonably practicable after finding out that a judgment has been entered.

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

The section goes on to give the court the option to vary the judgment if it sees fit.

Real prospect of successfully defending the claim

Reasonably practicable

[10] Bearing in mind that the first defendant from the point at which he received the papers in July 2013 and took them to his insurance company, would have been taking issue with the service one would feel that this was the 'reasonably practicable' time to have made an appearance and register his objection to the issues . This was not done, and neither was it done when the acknowledgment was filed some eight months later. He filed a defence at that point which asserts in a perfunctory way that he was not driving and that the driver as not his servant or agent.

Good Explanation for failure to file…

[11] It is unsatisfactory that after handing the documents to the insurance company in July 2013, no explanation is given as to the gap up to March 2014 when the first defendant once again sought to file documents. I am of the view that the insurance company's actions must be attributed to the first defendant, they know well what the deadlines are for court actions and took no steps to protect the interest of the client for an extended period of time while the claimant waited. A date was set for assessment of damages and as is usual, it would seem that it was service of this notice that must have spurred the first defendant into action once again, as sometime in July 2014 after

another four months had passed and the claimant had persevered to gaining the judgment they sought to have it set aside.

[12] The affidavit from the first defendant is bereft of any explanation as to why all that time elapsed except to say that "I was advised … that it took some time for my said insurance company to verify and confirm my policy and to instruct an attorney".

[13] The main criterion to be considered is, admittedly, whether the defendant has a real prospect of successfully defending the claim. The issues of how soon the application was made to set aside and whether the defendant provided a good reason are mere factors to be considered in deciding that a default judgment properly obtained should be set aside; **Swain v Hillman [2001] 1 All E R 91.** The judge cannot make a moral judgment however questionably or tardily the defendant has acted, and the exercise of the discretion calls for a look at the evidential material albeit in a cursory way that exists, and the likelihood of its success at trial.

[14] In his proposed defence, the first defendant has stated that the driver of the vehicle he owned was not his servant or agent at the time of the accident. Ownership of the vehicle, raises this prima facie presumption of agency, albeit rebuttable; and the law allows for an owner to escape liability by showing that the driver's actions were not attributable to the owner by raising this defence.

[15] In **ED Mann Liquid Products Ltd v Patel [2003] CP Rep.51,** the court was of the view that the case must be more than arguable in order for there to be real prospect of success to exist. Admittedly, the lack of agency on the face of it would be a complete defence to the action. It is the court's view however that just to make this statement is not enough. If the applicant is to move the court to exercise its discretion in his favour in this circumstance, the defendant would need more. Just one suggestion of what the driver was about would have been sufficient to raise the issue of a reasonable prospect of success at trial and show some indication of success at rebutting the presumption; none is apparent save the bald assertion that the driver was on his own business.

[16] Several possibilities exist, a) the driver was using the vehicle with the permission of the owner, for the drivers personal use, b) the driver was on a mixed purpose in general but at the specific time of the accident was on personal business, or c) The driver is unconnected to the owner in a situation where ownership may have passed *'de facto'* but not *'de jure'.* These are all arguable positions, which if successful, would result in the first defendant avoiding liability for the accident.

[17] The problem is that what is raised must be more that just arguable. The court does not have to accept the assertion put forward without analysis.

> "*The claimant has something of value in his hand and ought not to be deprived of it without good and compelling reasons shown. While it is appreciated that the court must not be quick to deprive a litigant of his day in court on a point of technicality and without an assessment of the merits of the case, it is also the duty of the court to ensure that time limits are obeyed and that there is no flagrant disregard for the rules of procedure. The rules must be interpreted and applied to give effect to the overriding objective, which involves ensuring, as far as practicable, that cases are dealt with expeditiously and fairly."* Per McDonald-Bishop, J. in the Nanco case.

To set aside this default judgment given all the current circumstances would not be giving voice to the overriding objective and the interests of justice.

The orders of this court are then as follows;

1. The application of the first defendant that his Acknowledgment of Service filed on March 6, 2014 and served on March 12, 2014 be permitted to stand as filed is refused.
2. The application of the first defendant that Default Judgment be set aside and for permission that his defence filed on March 6, 2014 to stand as filed is refused.
3. Costs for the application are awarded to the claimant to be agreed or taxed.