[2019] JMSC Civ 244

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016HCV00275

BETWEEN	**BARBARA ANGELA REID**	**CLAIMANT**
AND	**MELROC INVESTMENTS LIMITED T/A/ ACCESS CAMBIO**	**DEFENDANT**

IN CHAMBERS

Ms Leslie Ann Stewart instructed by Symone Mayhew Attorney-at-law for the Defendant/Applicant

Ms Tameka Jordan and Ms Jade Hollis instructed by Hollis Law Attorneys-at-law for the Claimant/Respondent

Heard: November 20, 2019 and December 6, 2019

Civil Procedure – Application to set aside default judgment – CPR 13.2 and 13.3

MASTER T. MOTT TULLOCH-REID (AG)

[1] The Defendant has asked the Court to set aside a default judgment in default of Acknowledgment of Service which is dated January 5, 2018 and was entered in favour of the Claimant. The application is made pursuant to Parts 13.2 and 13.3 of the Civil Procedure Rules. The Defendant says because the Claim Form and Particulars of Claim were not served on it, the default judgment must be set aside as of right. Alternatively, it invites the Court to set aside the default judgment on the basis that it has a real prospect of successfully defending the claim.

[2] I must determine one of two things, whether the Defendant was in fact served with the initiating documents. If the answer is no, then that is the end of the matter as the Claimant will have to serve the Defendant if she is to pursue her claim against it. If however the answer is no, then I must determine whether the defendant should be given the opportunity of putting forward his defence. It will only be allowed to do so, if it has a real prospect of successfully defending the claim, has applied as soon as is reasonably practicable after finding out that default judgment has been entered against it and has provided a good explanation for its failure to file an acknowledgment of service within the time provided by the CPR.

Were the Claim Form and Particulars of Claim served on the Defendant?

[3] The Claimant says that the Claim Form and Particulars of Claim were served on the Defendant on January 28, 2016 by leaving them at Access Cambio at 28 Main Street, May Pen.

[4] The initiating documents state that the incident which is the subject of this claim took place at the Access Cambio which is located at 28 Main Street, May Pen.

[5] Ms Stewart argues that the Claim Form and Particulars of Claim were not served on the Defendant because they were not served at the company's registered address. Ms Claudine Liu, a director of the company, is the deponent of the Affidavit which supports the application. At paragraph 3 she states that the company's registered address is located at 18 Tennis Way in the parish of Saint Andrew. She states that the Defendant did not receive the claim form and particulars of claim in the matter. She appears to admit that the Defendant does in fact operate a business from 28 Main Street, May Pen but she says that the employees at that location "are not authorised to accept official business documents and correspondence on behalf of the company or the principals, and that documents must be delivered to the supervisor or manager in charge, subject to the approval of the directors of the company." This process seems to be quite an elaborate way of preventing documents from being received into the company. If the directors are not around, then it would appear that no authorisation will be

given to receive the documents and if the directors are around they have the option of not authorising receipt.

[6] Also of note is an admission that the initiating documents were indeed left at the May Pen Branch because Mrs Liu admits at paragraph 7 that the picture which is exhibited to the Claimant's Affidavit of Service "is of the ledge of a teller's station, on the side that a customer would normally stand when transacting business at the Cambio."

[7] Ms Jade Hollis swore an Affidavit in opposition to the application. She exhibits to that Affidavit a Certificate of Registration which indicates that the company registered a business name, Access Cambio, with a principal place of business at 28 Main Street, May Pen P O, Clarendon. She argues then that having left the documents at the principal place of business of Access Cambio, the Defendant was properly served.

[8] The issue of service is considered in Part 5 of the CPR. The Defendant is a limited liability company and so CPR Part 5.7 is important. It provides as follows:

> *"Service on a limited company may be effected –*
>
> *(a) by sending the claim form by telex, fax, prepaid registered post, courier delivery or cable addressed to the registered office of the company;*
>
> *(b) by leaving the claim form at the registered office of the company;*
>
> *(c)by serving the claim form personally on any director, officer, receiver, receiver-manager or liquidator of the company;*
>
> *(d) by serving the claim form personally on an officer or manager of the company at any place of business of the company which has a real connection with the claim; or*
>
> *(e) in any other way allowed by an enactment."*

[9] I am not sure as to the registered office of the Defendant since there was no proof of it except for the say so of Ms Liu. However, it is clear that if the service is effected at any place of business of the company which has a real connection with the claim, then it is that the service of the initiating documents would be personally

on an officer or manager of the company. In the instant case, the service was not purported to be done on an officer or manager of the company, it was just being left at the place of business of the company. The Defendant is arguing that this could not amount to proper service.

[10] I am to point out to counsel for the Defendant that the options set out in CPR Part 5.7 are options only. The word "may" as opposed to "must" is used and this suggests that the Claimant who wishes to serve the Defendant is able to use any method which would get the documents to the attention of the Defendant. The list set out in CPR Part 5.7, in my opinion, is a list of options that can be used to serve a registered company. The purpose of service is to get the documents that are being served to the attention of the Defendant. The incident took place at the May Pen location. On the unchallenged affidavit evidence of Ms Hollis, the Defendant had been in communication with the Claimant's attorneys-at-law concerning the incident from as far back as 2012 and had written to the Claimant's attorneys-at-law on letterhead with the address given as 28 Main Street, Clarendon, the place where the documents were left. Given the purpose of service and the place of service, I am of the view that the claim form and particulars of claim were properly served on the Defendant when they were left at Access Cambio, Main Street, May Pen in the parish of Clarendon. Having left the documents at the principal place of business of Access Cambio, it is very likely (on a balance of probabilities) that the documents would come to the attention of the principals of the Defendant.

Part 13.3 of the CPR

Good explanation for failing to file the acknowledgement of service within time

[11] The Defendant submits through its attorneys-at-law that the reason for its failure to acknowledge service in time is because it was not served with the Claim Form and Particulars of Claim. I have already commented on that.

Applied as soon as is reasonably practicable after finding out the judgment was entered

[12] I accept Mr Courtney Chin's evidence as contained in the Affidavit of Service filed on August 30, 2019 that the Default Judgment dated January 5, 2018 was served on the Defendant on May 16, 2018. I am of the view that the Defendant was evading service of all documents and it was only when it was no longer able to do so that it finally decided to participate in the proceedings. Having been served on May 16, 2018 and having made the application over one year later (September 16, 2019), I am of the view that the application was not made as soon as was reasonably practicable after finding out that the judgment was entered.

The Defendant has a real prospect of successfully defending the claim

[13] Ms Stewart relies on the case of **Victor Gayle v Jamaica Citrus Growers and Anthony McCarthy 2008 HCV 05707** which was heard by the Honourable Ms Justice C Edwards (Ag) as she then was. At paragraph 7 of her judgment Edwards J (Ag) highlighted that Rule 13.3 provided that the primary consideration in applications of this kind was whether the defence has a real prospect of success. Ms Stewart contends that this rule and this rule only should be at the forefront of my mind. It is my view that all three parts of CPR 13.3 work together to balance the scales of justice. The learned judge shared my view as she went on to say that in exercising the discretion of whether or not to set aside the default judgment, the court also had to consider CPR 13.3(2).

[14] I do not accept the evidence of Ms Liu at this time that the Defendant was unaware of an incident happening at the Cambio which concerned the Claimant. Its principals had been in communication with the Claimant's attorneys-at-law from as far back as 2012 and could have done their own internal investigations to satisfy themselves. The Claimant may not have reported the incident to them directly but they became aware of the allegation when the Claimant's attorneys-at-law invited them to engage them in settlement discussions.

[15] With respect to the substance of the defence itself, this must be set out in an Affidavit of Merit as well as the draft defence which is to be exhibited to the Affidavit of Merit. The Affidavit of Merit sets out the Defendant's defence. It states at paragraph 9 that the it has discharged its statutory and common law duties in taking reasonable steps to secure the Claimant and other members of the public. At paragraph 11 Ms Liu swears as follows:

> *"… the stairs on which the Claimant claims to have fallen are and were fitted with non-slip tiles,* ***not uneven in height*** *(my emphasis) and built with three hand rails to the left, right and in middle of the stairway. If the Claimant indeed fell and if she was careful in her descent, she would not have injured herself."*

[16] Paragraph 4 of the draft defence has similar wording except for the words emphasised above "not uneven in height". I emphasize that bit of evidence because Ms Jordan argues that the defence and affidavit of merit as put forward does not raise a defence to the claim that the Claimant has brought. The Claimant, she argues, is not saying there are no handrails or non-slip tiles. She says that the Claimant is saying that there was a "sharp dip into the sunken area which is not noticeable" and of which the Defendant failed to notify the Claimant. Ms Jordan says the lack of notice is the main thrust of the Claimant's claim and that neither the Defendant's affidavit of merit nor draft defence addresses that issue and as such there is no potential defence before the Court which has a reasonable prospect of success.

[17] I disagree with Ms Jordan in this respect. I am of the view that the affidavit of merit and draft defence combined would be provide the defendant with a real prospect of success. If the steps are even, as the Defendant will seek to allege if given the opportunity to file its Defence, then there can be no "sharp dip into the sunken area". If the Claimant were using the handrails in her descent and exercising reasonable care in approach to and descending the stairs, then it is possible that she would not have fallen. These are issues to be determined at a trial. Photographs of the stairway and the place of the fall as it existed at the time of the

incident would have to be presented to the trial judge for him/her as judge of fact to make that determination.

Prejudice

[18] Ms Jordan has submitted that if the default judgment is set aside, the Claimant will be prejudiced. She argues that the Claimant in having the default judgment has a thing of value which she should not be deprived of. She says that if the default judgment is set aside, then the Claimant's case will not be heard before 2025 and so the Claimant would have waited for 15 years before her claim is finalised. I agree with the submissions, but I wish to throw something else into the mix. The Claimant was injured in 2011 but she failed to file her claim until 2016 – 5 years after the incident had occurred. I accept that she was attempting to engage the Defendant in settlement discussions. However, there is nothing to prevent a party from initiating proceedings in this Court while simultaneously embarking on settlement discussions. In fact, that would be the wisest and safest way to proceed because settlement discussions can break down at any time. I will go further to say that from as far back as 2012 the Defendant had been resisting the settlement discussions and in more than one letter to the Claimant's attorneys-at-law, indicated that they had no record of the incident of which the Claimant complained. It would seem to me that the Claimant's attorneys-at-law should have, from as far back as 2012, filed a claim on behalf of their client. The Claimant has herself contributed to any prejudice she may or will suffer because of time issues. Had she filed her claim in 2012, she should have been nearer to a trial date now or had her matter already disposed of.

[19] The question then becomes, who will suffer the greater prejudice if the default judgment is or is not set aside. If the default judgment is set aside the Defendant will be able to participate fully in the proceedings when it had done everything it could to avoid participating, and the Claimant's hearing will be postponed. If the default judgment is not set aside, the Defendant will not be able to put forward its

defence, which has a real prospect of succeeding and the Claimant's matter will come before the Court at an earlier date.

[20] The Court is permitted to set aside regularly obtained default judgments because until a Court has pronounced on the merits of the case, it should have the power to set aside a judgment that came about because a party failed to comply with rules of procedure (see the case of **Evan v Bartlam [1937] AC 473**. I believe that this is a case that should go to trial despite the Defendant's tardiness in making its application to set aside the default judgment and its failure to provide a good explanation for failing to acknowledge service in the requisite time. I must however reiterate that the Civil Procedure Rules are meant to be complied with and defendants who refuse to do so must be punished for their non-compliance.

[21] I therefore order as follows:

a. The default judgment entered in Judgment Binder 770 Folio 336 dated January 5, 2018 is set aside.

b. The Defendant is to file and serve his defence to the claim on or before December 13, 2019. If the Defendant fails to file its defence on or before December 13, 2019, the Registrar is directed to enter judgment in favour of the Claimant and to schedule a date on which damages are to be assessed.

c. The parties are to attend mediation on or before February 28, 2020.

d. Should mediation be unsuccessful the parties are to attend CMC on March 23, 2020 at 11:00am for half an hour.

e. The date on which the Assessment of Damages is scheduled to take place, that being January 13, 2021 is vacated.

f. The Defendant is to pay the Claimant costs in the application and costs thrown away in the amount of $100,000.00 on or before December 20, 2019 failing which its statement of case will be struck out.

g. Leave to appeal is granted.

h. The Claimant’s attorneys-at-law are to prepare, file and serve the Formal Order.