



[2023] JMSC Civ 82

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2020CV00377

BETWEEN	VINETTE ROBERTS	CLAIMANT
AND	DAMION BRIGADIER SMITH	1ST DEFENDANT
AND	LANCELOT SMITH	2ND DEFENDANT

IN CHAMBERS

Mrs. Tereece Campbell-Wong, Attorney-at-Law instructed by Caroline P. Hay Attorneys-at-Law for the Claimant

Mr. Garth McBean, K.C., Attorney-at-Law instructed by Garth McBean & Co, Attorneys-at-Law on behalf of the 1st Defendant

HEARD: April 12, 20 and 27, 2023

Civil Procedure- Civil Procedure Rules 10.3(1) and (9) and 26.1(2)- Application to extend time to file defence

P. MASON J (AG.)

BACKGROUND TO THE CLAIM

1. On February 03, 2020, the Claimant, Vinette Roberts, filed a Claim Form and Particulars of Claim against the Defendants seeking damages for negligence arising from a motor vehicle accident which occurred on June 29, 2016. The 1st Defendant's vehicle driven by the 1st Defendant's now deceased father (Letburn Smith), collided into the Claimant while she was crossing Molyne's Road in the parish of St. Andrew. The 2nd Defendant, Lancelot Smith, is the personal representative of the estate of Letburn Smith.
2. On the 22nd of June 2020, Master T. Mott Tulloch-Reid (as she then was) made an order for substituted service permitting service of the Claim Form and Particulars of Claim on one Mr. Robert Brissett (the alleged cousin of the 1st Defendant) in the USA

which would be regarded as service on the 1st Defendant. Service was thereafter effected on Mr. Brissett on July 16, 2020.

3. The documents were thereafter brought to the 1st Defendant's attention on January 20, 2022, by his mother who received them from Attorney-at-Law, Gladys Brown, Attorney acting on behalf of the 2nd Defendant.
4. On April 6, 2022, the 1st Defendant filed a Notice of Application for Court Orders seeking the following orders:
 1. *An order that the time for the filing of an Acknowledgement of Service and Defence to the Claim herein be extended to 14 days from the date of this order.*
 2. *An order that the cost of this application be costs in the claim.*
 3. *Such further or other relief as this Honourable Court deems fit.*
5. The grounds upon which this application is made are as follows:
 1. *The Defendant did not receive the Claim Form, Particulars of Claim in the claim herein and only knew of the claim when documents were sent to him by his mother on the 20th January 2022.*
 2. *The Defendant acted promptly in retaining Attorneys-at-Law after finding out about the claim herein.*
 3. *The Defendant has a good defence to the claim herein.*
 4. *It is just to make the orders herein which will further the overriding objective.*

ISSUE

6. Whether the court ought to exercise its discretion to grant the order extending time to allow the 1st Defendant to file his acknowledgment of service and defence.

THE LAW

7. The application to extend time is being made pursuant to Civil Procedure Rules (CPR) r. 10.3 and 26. CPR r. 10.3 (1) provides that the general rule is that the period for filing a defence is the period of 42 days after the date of service of the claim form. CPR r. 10.3(9) provides that the Defendant may apply for an order extending the time for filing a defence.
8. CPR r. 26.1(2) provides:

Except where these rules provide otherwise, the Court may-

(c) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for extension is made after the time for compliance has passed.

9. The Claimant strongly opposes the said application on the ground that the 1st Defendant is in effect seeking to set aside the order for substituted service which is not the application that is before the court. They sought to rely on CPR r. 11.16 (1) – (3) in stating that the proper procedure was not followed.
10. CPR r. 11.16 (1) states: “A respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside or varied and for the application to be dealt with again.” The section continues at r. 11.16(2) “A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent.” Finally, r. 11.16 (3) states, “An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule.”
11. At the hearing of the said application, counsel for the 1st defendant averred that the Defendant could not have been able to comply with the said rule if he was not aware of the fact that service had taken place.
12. It is important to note, however, that the rules do not lay down the specific criteria to be used when the discretion to enlarge time is to be exercised. One must look to case law for the approved guidelines.
13. In the case of **The Attorney General of Jamaica and Western Regional Health Authority vs. Rashaka Brooks JNR (A Minor) by Rashaka Brooks SNR (His father and Next Friend) [2013] JMCA Civ 16**, Brooks JA in dealing with an application to extend time to file a defence had this to say at paragraph 21:

*“...it is our view that it is only in special circumstances that such an application should succeed. A defendant who has not produced evidence of merit should only be successful if he were able to convince the court that it would be just to extend the time. **The decision should lie within the discretion of the judicial officer hearing the application.** Without laying down any mandatory criteria, such an application should address the issues identified by Lightman J and explain to the satisfaction of the court the efforts made to secure the evidence concerning the element of merit and the reason for its absence.”*

14. The court in *The Attorney General of Jamaica and Western Regional Health Authority vs. Rashaka Brooks JNR (A Minor) by Rashaka Brooks SNR (His father and Next Friend) (Supra)* at paragraph 15, referred to the case of *Fiesta Jamaica Limited v National Water Commission* where the court approved the approach to assessing such applications. Harris JA in that case adopted the principles referred to by Lightman J in the case of *Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Ors. [All England Official Transcripts (1997-2008) (delivered 18 January 2000)]* at paragraph 8 where he said:

“8. The position, however, it seems to me, has been fundamentally changed, in this regard, as it has in so many areas, by the new rules laid down in the CPR which are a new procedural code. The overriding objective of the new rules is now set out in Pt 1, namely to enable the court to deal with cases justly, and there are set out there after a series of factors which are to be borne in mind in construing the rules, and exercising any power given by the rules. It seems to me that it is no longer sufficient to apply some rigid formula in deciding whether an extension is to be granted. The position today is that each application must be viewed by reference to the criterion of justice and in applying that criterion there are a number of other factors (some specified in the rules and some not) which must be taken into account. In particular, regard must be given, firstly, to the length of the delay; secondly, the explanation for the delay; thirdly, the prejudice occasioned by the delay to the other party; fourthly, the merits of the appeal; fifthly, the effect of the delay on public administration; sixthly, the importance of compliance with time limits, bearing in mind that they are there to be observed; seventhly, (in particular when prejudice is alleged) the resources of the parties.” Emphasis mine

15. Therefore, in considering whether the court ought to grant an order for extension of time, I must consider whether there is enough material before me to justify the length of the delay, the explanation for the delay, the merit of the defence, the prejudice occasioned by the delay to the other party and the importance of compliance with time limits.

LENGTH OF THE DELAY

16. In this particular case, counting from the date the substituted service order was carried out where the documents were served on Mr. Robert Brissett is a period of approximately 2 years and 9 months. However, Counsel for the 1st Defendant submitted that the 1st Defendant only became aware of the Claim after it was served on his mother on the 20th of January 2022 and thereafter proceeded to file an application for extension of time to file the defence on April 6, 2022, almost four months

after the documents were brought to his attention. In the circumstances, I am of the view that the delay in filing the application for an extension of time is not inordinate.

17. In any event, the length of time is only but one of the factors which is to be considered in determining whether or not to refuse the application as it is not without more fatal to the exercise of the discretion. This would have to be reviewed in conjunction with a number of issues including the reason for the delay.

EXPLANATION FOR THE DELAY

18. The reason extended by the 1st Defendant for the delay is that Mr. Brissett, on whom the documents were first served under the order for substituted service, is not known to him. In his supporting affidavit filed on April 6, 2022, at paragraph 7, the 1st defendant stated:

I do not know Robert Brissett, nor is he related to me. I do not know the address at which the documents were alleged to have been served by substituted service.

19. The 1st Defendant further avers that he only became aware of the claim when he received copies of the said documents from his mother who informed him that she received same from Miss Gladys Brown, Attorney-at-Law for the 2nd Defendant.

20. Support is found for the 1st Defendants position that he does not know Mr. Brissett mentioned in the Affidavit of Service of Juan Azcuy dated July 16, 2020, in which he stated at the very last line that "*Robert Brissett stated that the Defendant, Damion Brigadier Smith was unknown to him*".

21. The Claimant's Attorney submitted at paragraph 3 of her submissions that:

"Before this honourable Court is an application for the extension of time to file an Acknowledgement of Service and Defence and not an application to set aside the Order of Master Mrs. Mott Tulloch-Reid".

22. Counsel relied on the case of **Wakako Yoneyama McGee and MIWA Enterprise USA v Norris Webb [2013] JMSC Civ 213** to submit that the court does not have jurisdiction to review an order for service with a view to setting it aside unless the procedure set out in CPR r. 11.16 (1) and (2) was complied with. On the contrary, however, it was submitted on behalf of the 1st Defendant that there is no application before the court to set the substituted service order aside.

23. I agree with the 1st Defendant that the order for substituted service was mentioned only in the context that it furthered the explanation provided by the 1st Defendant for the delay. At no point did the 1st Defendant state that the order for substituted service was “bad” or should be set aside. As such, this court will not venture down the path of determining the validity of the substituted service order nor will the Court look behind the order made by Master Mrs. Mott Tulloch-Reid (as she then was) as no such application is before me.

24. In light of the above, I accept the explanation provided by the 1st Defendant for the delay. However, in case I am not correct, I look to the case of **Finnegan v Parkside Health Authority [1997] EWCA Civ J1120-5** where it was held that when considering an application for an extension of time for complying with procedural requirements, the absence of a good reason for any delay was not in itself sufficient to justify the court in refusing to exercise its discretion to grant an extension, but the court was required to look at all the circumstances of the case and to recognize the overriding principle that justice has to be done.

25. I will now proceed to look at the merit of the Draft Defence as presented by the 1st Defendant.

MERIT OF THE DEFENCE- WHETHER THE 1ST DEFENDANT HAS AN ARGUABLE CASE

26. Gilbert Kodilinye in his text, **Commonwealth Caribbean Civil Procedure, 3rd Ed.**, stated at page 21 in relation to applications to extend time to file and serve a defence that:

It has been held in Jamaica that, in the absence of any criteria in Rule 10.3(9) to guide the court, there was a general discretion as to what, if any, time to allow, and the court should consider whether the defendant had a properly arguable defence, however tardy he may be in making his application for further time.

27. McDonald-Bishop J (Ag.) (as she then was) in the case of **Marcia Jarrett v South East Regional Health Authority et al [2010] JMCA Civ 15**, stated at paragraph 39 that:

“39. A defence on the merits would simply be a defence that, when examined in relation to the claim, would show that the defendants have a real prospect of successfully defending the claim. It must be a defence having a “real” prospect as opposed to a “fanciful” prospect

of success. In Blackstone's Civil Procedure, 2004 at paragraph 34.13 it is stated that on an application for summary judgment by a claimant, the defendant may seek to show a defence with a real prospect of success by setting up one of the following:

"a) a substantive defence e.g., volenti non fit injuria, frustration or illegality.

b) a point of law destroying the claimant's cause of action;

c) denial of facts supporting the claimant's cause of action;

d) further facts answering the claimant's cause of action, e.g. an exclusion clause, or that the defendant was an agent rather than a principal." "

28. As previously outlined, this case is a personal injury case in which the Claimant is alleging that she suffered personal injuries due to the 1st Defendant's car which was being negligently driven by his now deceased father. The 1st Defendant is being sued in his capacity as owner of the vehicle and the Claimant alleges that the driver of the vehicle was the 1st Defendant's agent.

29. The 1st Defendant in his Draft Defence defended the claim by denying at paragraph 4 that the deceased, Letburn Smith was his servant and or agent and that the late Letburn Smith was neither employed to him nor was he driving the said motor vehicle with the knowledge or permission of the 1st Defendant or for his purposes at all. The 1st Defendant at paragraph 10 of his supporting affidavit stated that he was not in the country at the time of the incident. He states that he left his vehicle at his house at 6 Huntsdene Avenue, Kingston 10 before leaving to go overseas. In essence, the 1st Defendant is denying agency or that he is vicariously liable.

30. The Claimant's Attorney in her submissions asserted at paragraph 17 that:

"17. We agree that the payment was made without admission of guilt and that their right to defend was preserved. However, we submit that the basis of the partial release and discharge was the existence of an agency relationship between the 1st Defendant and Letburn Smith, deceased. This is especially so as GA also investigated the accident prior to the execution of the release and discharge and thereafter decided to include Letburn Smith in the settlement."

31. I do not agree with the above. The Defendant's right to defend the claim was preserved in the Partial Release and Discharge. If you are acknowledging that, you cannot now say that the agency relationship was established because the insurance company included Letburn Smith, deceased, in the settlement. I am of the view that the issue of

agency is a matter for the trial judge to determine. This is not a unilateral matter for the insurance company especially in light of the fact that they preserved the 1st Defendant's right to defend any claim arising from the accident in the Partial Release and Discharge.

PREJUDICE

32. In the instant case, I am of the view that there would not be any prejudice to the Claimant if the application is granted. The granting of the application would not deny the Claimant an expeditious and fair resolution of the matter. It would also not delay the matter as no trial dates were set nor has the Default Judgment been issued and the matter determined on its merits. It would not be in contravention of the overriding objective of the CPR rules to deal with cases justly (CPR rule 1.1(1) and (2)) and there is no undue delay on the part of the 1st Defendant.

COMPLIANCE WITH TIME LIMITS

33. The court has adopted a strict approach when considering an application for an extension of time, particularly in circumstances where the excuse is poor or no excuse for a delay has been advanced with complying with the rules.

34. In the instant case, the reason advanced for the delay in complying with time limits is reasonable and satisfactory. The Court is very reluctant to offer a helping hand to tardy litigants as delay results in backlog and a retarded dispensation of justice. The Court is also reluctant to offer a helping hand where there is a delay in complying with rules of procedure and timelines.

35. In the circumstances, I find that there is an arguable case, and the 1st Defendant has demonstrated that there is a real prospect of successfully defending the claim as there are issues to be determined at a trial.

DECISION

36. Based on the aforementioned discussion and in the interest of justice, I will exercise my discretion and grant the order to extend time to file the defence. The issues in this case require full ventilation at trial. The Court, after hearing evidence, and submissions, would have to make a decision as to whether or not an agency relationship actually existed between the 1st Defendant and Letburn Smith.

ORDER

37. I therefore make the following orders:

1. The 1st Defendant is to file an acknowledgement of service and a Defence to the claim within 28 days of the date of this order.
2. Costs of this application to be costs in the claim.
3. The 1st Defendant/Applicant's Attorney-at-Law shall prepare, file and serve this order.