



[2021] JMSC. Civ 203

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2014HCV03800**

<b>BETWEEN</b>	<b>VANESSA ROSE-CHRISTIE</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>L &amp; L TRADING LIMITED</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Mrs. Khadine Dixon instructed by Dixon and Associates Attorneys-at-Law for the Claimant

Miss Kadida Hyman instructed by Zara Lewis & Company Attorneys-at-Law for the Applicant

May 10, 2021 and June 23, 2021

**Oral Judgment**

Master Stephany Orr

- [1] By Claim Form filed on August 5, 2014, the Claimant Vanessa Christie, claimed damages for negligence and breaches of the Occupier's Liability Act as against the Defendant L&L Trading Limited.
- [2] She alleged in her Particulars of Claim that she visited the Defendant's store in June 2013, where she stumbled and fell to the ground after bumping into some boxes which were negligently and carelessly left in the walkway of the Defendant's store.
- [3] An affidavit of service was filed on February 27, 2015. Mr. Michael Bennett, the process server, stated that he served the Defendant who he named as L & L

Trading, personally on August 11, 2014. Service was effected when he delivered the Claim Form and attendant documents to a supervisor, at what he described as the registered offices of the company, Shop 4, 3C Portmore Mall Plaza, Portmore in the parish of Saint Catherine. He says further that at the time of service Miss Clarke admitted “that the company, L & L Trading was the Defendant in this matter”.

- [4] Interlocutory Judgment was subsequently entered against L & L Trading in default of Acknowledgement of Service on February 18, 2016.
- [5] On October 2, 2020, an Acknowledgement of Service was filed on behalf of “the second Defendant” this would have been an error as there is only one Defendant listed. The Acknowledgment of Service stated that the Defendant’s name was incorrectly listed on the claim form. The defendant lists his name as Glen Clarke trading as L&L Trading in the Acknowledgement of Service.
- [6] Mr. Clarke also denied ever being served with the Claim Form and Particulars of claim. He acknowledged receipt of the Interlocutory Judgment and Notice of Assessment of Damages which prompted him to retain Counsel to represent him.
- [7] By Notice of Application filed on October 2, 2020, Mr. Clarke sought to set aside the Interlocutory Judgment entered against him, or in the alternative, strike out the Claimant’s claim. This was the application before me for consideration, which was opposed by the Claimant.
- [8] In perusing the court file, I noticed that there were certain inconsistencies in the claim itself. The claim was commenced against L & L Trading Limited, however Interlocutory Judgment was entered against L & L Trading, which is a separate entity.
- [9] It is clear from the affidavit of Michael Bennett, the claimant’s process server, that when he effected service of the Claim Form, he was of the belief that the defendant

was a registered company. Recall that he spoke of serving the defendant at its registered office.

- [10] Mr. Michael Bennett attended the hearing of the Defendant's application and was cross examined as to his actions on August 11, 2014, when he purported to serve the Claim Form. His evidence was that the Claimant Mrs. Christie, accompanied him to the Defendant's place of business and observed him serving the Claim Form and Particulars of Claim. In cross examination he said that Mrs. Christie instructed him to serve the owner of L & L Trading. She did not tell him the name of the owner. He was of the belief that serving the documents at the shop/establishment would be acceptable service on the owner.
- [11] He also said that he entered the store and spoke with Miss Clarke who informed him that the owner was busy and therefore the documents should be left with her. Notably none of this evidence was included in his affidavit of service filed on February 27, 2015. In that document he does not indicate that he went to serve the owner. He spoke of leaving documents at the registered office.
- [12] In her evidence Mrs. Christie speaks to instructing Mr. Bennett to serve Mr. Clarke of Glen Jems, gives a description of the store and outlines how she observed him serving the documents on the supervisor who is the person one would get discounts from at the store. She outlines in detail that this individual steps away makes a call and then takes the documents from Mr. Bennett. Miss Christie cannot however speak to any conversation that Mr. Bennett and this individual have.
- [13] Importantly, while Mrs. Christie speaks to what she saw, her evidence must be considered in light of Mr. Bennett's affidavit evidence when he effected service which merely speaks to serving the Claim Form on the registered office. So while she speaks to observing service of the documents, I am not persuaded that Mr. Bennett's conversation with the store clerk was anything other than was stated in his Affidavit of Service of February 27, 2015. I have therefore not placed any much weight on Mrs. Christie's evidence.

- [14] Notably, the named defendant in the Claim Form is L & L Trading Limited. A reasonable inference is that when Mr. Bennett went to effect service of the Claim Form, he was of the belief that he was serving a registered company, hence his reference to the registered office of the company in his affidavit of service.
- [15] I did not find Mr. Bennett to be a credible witness. His evidence in cross examination was self-serving as in his affidavit evidence he made no mention of being told to serve the owner or asking to speak to the owner of the business when he visited what he described as the registered office of L & L Trading. He was satisfied that he had served the defendant by leaving the documents at the registered office.
- [16] Mr. Clarke's Acknowledgement of Service raises an important issue. He states in that document that his trade name is L & L Trading. This would indicate that he operates as a sole proprietor. The claim should therefore have been commenced against Mr. Clarke in his personal capacity trading as L& L Trading. In addition, Mr. Clarke should have been served personally. CPR 5.3 prescribes personal service of the Claim Form by handing it or leaving it with the person to be served.
- [17] I am not satisfied on the evidence before me that the Claimant has established that Mr. Clarke was served with or received the claim form which was left at his place of business. All that has been established is that the claim form was left with one Miss Clarke an employee of Mr. Glen Clarke as Mr. Bennett believed that he was serving the claim form on a registered company.
- [18] Mr. Clarke's Acknowledgement of Service also raises another issue, which is whether the proper party was joined as a Defendant. The named defendant is L & L Trading Limited which is not the same enterprise as L & L Trading against whom Interlocutory Judgment was entered. This is an irregularity.
- [19] The documents filed on behalf of the Claimant use the names L & L Trading Limited and L & L Trading loosely throughout. It was clear that this error was first recognised by counsel for the Claimant when I was in the process of delivering my

oral judgment. In outlining the evidence before me and referencing the pleadings that I had considered in arriving at my decision I pointed out this error.

- [20] Counsel sought at that point to seek an adjournment of the defendant's application to file a Notice of Application to amend the claim to substitute Glen Clarke t/a L & L Trading to cure this defect.
- [21] I refused her application as it was made when I was delivering my decision and after I had explained the deficiencies in the Claimant's claim. This would result in the Claimant being allowed to amend her claim, after the hearing had almost concluded and while the ruling was being made.
- [22] In any event, while CPR 19.4 might allow the Claimant to amend her claim after the expiry of the limitation period and substitute Glen Clarke t/a L & L Trading as the Defendant, she was unable to overcome the fact of having never served Mr. Clarke personally with the Claim Form, nor having provided satisfactory evidence that the Claim was served on someone who had or was likely to bring it to his attention. She would have also needed to secure an order extending the validity of the Claim Form before serving Mr. Clarke, and at this stage the validity of the Claim Form could not be extended.
- [23] CPR 13.2(1) provides that:

*"The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because-*

*(a) In the case of a failure to file an acknowledgement of service, any of the conditions in rule 12.4 was not satisfied."*

CPR 12.4(a) provides:

*"the claimant proves service of the claim form and particulars of claim on that defendant"*

- [24] In the instant case, neither the named Defendant to this claim, L & L Trading Limited, nor the intended Defendant Glen Clarke t/a L & L Trading was served with the Claim Form and Particulars of Claim. Service was effected on Mr. Clarke's

employee. On this basis the interlocutory judgment entered by the Registrar is irregular and should be set aside.

- [25] There was also an affidavit of merit filed on behalf of Mr. Clarke which I have also considered. His notice of application sought an order in the alternative, that he be permitted to file a defence out of time. He explained that he was not served with the Claim Form and Particulars of Claim and only learned of this claim when he was served with the Interlocutory Judgment and Notice of Assessment of Damages in July 2020.
- [26] He said further that he applied to set aside the Default Judgment within a short period after being served with the Interlocutory Judgment and notice of assessment.
- [27] Mr. Clarke went on to give evidence as to what occurred in the store which he operates in the Portmore Mall which he admits the Claimant visited. He states that she arrived after the store was closed and that she asked him to accommodate her which he did as he knew both Miss Christie and her husband.
- [28] He and his staff were restocking goods but he nevertheless allowed the Claimant to enter his store to quickly select her braids and leave the store. She was chaperoned by a member of staff while in the store. He said that he heard a tumble and later learnt that while Mrs. Christie was walking backwards in the store, she fell over a box on the floor. He said that when she was leaving the store she appeared to be perfectly fine.
- [29] As Mr. Clarke did not witness Mrs. Christie's fall, there was also the affidavit of Miss Nodene Brown who stated that she was employed by Mr. Clarke as a store clerk. She said further that when Mrs. Christie arrived at the store, Mr. Clarke instructed her to chaperone Mrs. Christie so that she would be able to purchase her braids and leave the store quickly as the store was closed to the public.

- [30] Miss Brown said further, that when they entered the isle where the braids were stored, there was a box on the floor, as they were in the process of restocking the shelves. This box was, as she said, "within our field of vision as we walked towards it". After Mrs. Christie identified the braids she wished to purchase, Miss Brown took them from the shelf for her. She said further that while she was assisting Mrs. Christie, she seemed to be interested in another item stored high on another shelf. Mrs. Christie, she said, began to step back, and while stepping back, she tripped over a box that was on the floor.
- [31] Miss Brown went on to say that Mrs. Christie stood up without her assistance after the incident. She also commented that it was her own fault as she tripped because she was not looking behind her as she walked backwards.
- [32] Both Mr. Clarke and Miss Brown have stated that she appeared to be uninjured when she walked out of the store.
- [33] In the draft defence exhibited to Mr. Clarke's affidavit, he denied liability for negligence and states that he discharged his duty of care to all occupiers under the Occupiers Liability Act. He also puts the claimant to proof of any injuries as he denied that she sustained any injuries as a result of the fall. In this regard, he also took issue with her failure to attach the medical report which she intends to rely on at trial to establish her injuries.
- [34] Mrs. Christie's claim is for damages for Negligence and for breaches of the Occupier's Liability Act. There is no dispute that the Claimant was in Mr. Clarke's store and that he would owe her a duty of care. Mr. Clarke's affidavit and draft defence raise serious challenges to Mrs. Christie's claim as to how she fell in the store, whether she sustained any injuries and also the issue of Contributory Negligence. These issues are best resolved at trial where the parties and their witnesses can be subjected to the scrutiny of cross examination.
- [35] I find that Mr. Clarke has a good defence on the merits which is the primary consideration for setting aside a default judgment. He has applied to set aside the

interlocutory judgment which I have already stated was irregularly entered, in a timely manner. In his affidavit he states that he was served with the Interlocutory Judgment in July 2020. His Notice of Application to Set Aside the Interlocutory Judgment was filed a little over two months later on October 2, 2020. I do not find that this was an inordinate time. I have accepted his explanation for not filing an Acknowledgement of Service this being that he was never served with the Claim Form.

- [36] Foremost in my mind in considering the peculiar facts of this case, is the fact that the judgment entered by the Registrar was entered against L & L Trading a sole proprietorship but the sole proprietor Glen Clarke was never served. Another anomaly, is that the claim was commenced against L & L Trading Limited, but interlocutory judgment was entered against “L & L Trading” with no prior amendment to the pleadings. Further “L & L Trading” has no legal capacity. The claim had to have been commenced against the sole proprietor Glen Clarke, trading as L & L Trading.
- [37] For the foregoing reasons the Judgment in default of Acknowledgment of Service entered on April 12, 2017 against L & L Trading is set aside.
- [38] The order of the court is as follows:
  - 1. The Judgment in default of Acknowledgement of Service entered on April 12, 2017 is set aside as it was irregularly entered against L & L Trading and not L & L Trading Limited.
  - 2. The costs of this application are to Glenford Clarke T/A L & L Trading, to be taxed if not agreed.
  - 3. The Attorney-at-Law for Glenford Clarke t/a/ L & L Trading is to prepare, file and serve this order.
  - 4. Leave is granted to the Claimant to appeal this order.