



[2018] JMSC Civ 182

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017HCV00913

BETWEEN	TREVOR RUDDOCK	CLAIMANT
AND	FARRAN BROWN	DEFENDANT

IN CHAMBERS

Mr. Lijyasu M. Kandedore for the Claimant

Mr. O'Neil Brown instructed by O'Neil Brown and Company for the Defendant

Heard: May 16, 2018 and October 8, 2018

Application to Set Aside Default Judgment – pursuant to Rule 13.3 of the Civil Procedure Rules (CPR) as amended in 2006

MASTER MASON

[1] Mr. Farran Brown, the Defendant and Applicant in these proceedings, seeks the following orders by way of Notice of Application for Court Orders filed on March 21, 2018 that:

- (1) The Default Judgement dated the 13th of June 2017, entered against the Defendant be set aside.
- (2) Any further process by this Court consequent to or flowing therefrom be stayed pending the outcome of this application.
- (3) The Defendant be then given leave to file his Defence within the requisite time as may be stipulated by this Honourable Court.

[2] The grounds on which the Applicant is seeking the Orders are as follows:

- (1) That pursuant to rule 26.1(2)(c) of the Civil Procedure Rules, 2002, the Court may extend the time for compliance with any rule ... even if the application is made after the time for compliance has passed.

BACKGROUND FACTS

[3] On the 21st March 2017, Mr. Trevor Ruddock, the Claimant filed a claim where he claims against the Defendant, for a debt pursuant to a written agreement dated the 26th September 2012 made between the Claimant and the Defendant for attorney's fees, fees for negotiations over a generator in dispute at the hotel, miscellaneous expenses and monies loaned by the Claimant to the Defendant. The Claimant asserts that these expenses were to be paid by the Defendant to him from the proceeds of sale of Paradise View Hotel in the Parish of Westmoreland. The debt to date remains due and outstanding.

[4] The Claimant therefore claims against the Defendant as follows:

- a. THE SUM OF \$3,500,000.00;
- b. Interest on the said sum of \$3,500,000.00 @ the rate of 9% per annum from the 22nd September 2012 to the date hereof, until payment or judgement; and
- c. Costs; and
- d. Attorney's costs.

[5] The Claim Form and Particulars of Claim were filed on March 21, 2017 and were served on the Defendant on March 30, 2017. The Defendant, through his Attorneys-at-Law, O'Neil Brown & Company, subsequently filed an Acknowledgement of Service on April 6, 2017. On that Acknowledgement of Service, it was indicated that there was an intention to defend the claim. The Defendant did not serve a Defence in the time allowed by the rules and no request for an extension of time to do so was made.

- [6] On 13th June 2017, the Claimant obtained Judgement in Default of Defence against the Defendant. On June 13, 2017, Judgement was entered for the Claimant against the Defendant in the sum of Five Million Fifty-One Thousand Nine Hundred and Sixty-Six Dollars and Twenty-Three Cents (\$5,051,966.23) inclusive of interests and costs.

The evidence in support of the application

- [7] The main evidence in support of the application to set aside the judgement dated the 13th of June 2017 comes from the Defendant, Mr. Fa.0
- [8] rran Brown. In so far as is immediately relevant, Mr. Brown stated the following at paragraph 2 of his affidavit filed on March 21, 2018 in support of Notice of Application to Set Aside Default Judgment:

“That a Judgement in Default of Defence was entered against me on the 13th of June 2017 and that, for a variety of reasons, I now wish to have this Judgement set aside with a view to proceeding to an open trial/hearing regarding the merits of the competing claims. That I was served this judgement on March 16, 2018. That I hereby exhibit a copy of that Judgement as “FB1”.

- [9] Mr. Brown then goes on further to indicate at paragraph 3 of his Affidavit his reason for failing to file a Defence in the time stipulated by the Rules. He stated as follows:

“My health status at that time made it impossible for me to supply my Counsel with the necessary instructions, documentation and exhibits to properly and adequately draft, prepare and file my Defence in a timely fashion.”

Whether Judgment should be set aside?

[10] The power of the Court to set aside a Default Judgment regularly obtained is to be found in Part 13 of the Civil Procedure Rules 13.3 as amended in 2006.

The rule states as follows:

- (1) The court may set aside or vary a judgment entered under Part 12 if the defendant had a real prospect of successfully defending the claim.
- (2) In considering whether to set aside or vary a judgement 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 acknowledgment of service or a defence, as the case may be.
- (3) Where this rule gives the court power to set aside a judgement, the court may instead vary it.

[11] As highlighted by McDonald-Bishop, J. at paragraph (63) in the case of **Joseph Nanco v Anthony Lugg and B&J Equipment Rental Limited** [2012] JMSC Civ 81.

By now, it is well known that the primary test for setting aside a default judgment regularly obtained is that the defendant must have a real prospect of successfully defending the claim rather than a fanciful one: **Swain v. Hillman and Anor.** [2001] 1 ALL ER 91.

[12] McDonald-Bishop, J then went on to highlight the requisite consideration that must be borne in mind in evaluating whether the test has been satisfied at paragraph [64], where it was opined that:

*“In evaluating whether the test has been satisfied, there must be shown a defence on the merits to that requisite standard. In **Furnival v. Brooke** [1883] it was said (and I take it as being applicable today) that where the judgment is regular the court has*

*a discretion in the matter and the Defendant, as a rule, must show by affidavit that he has a defence to the action on the merits. Stuart Sime, in his text, **A Practical Approach to Civil Procedure, 6th edition, p 248**; noted that the written evidence in support of the application to set aside will have to address, in particular, the alleged defence on the merit, the reason for not responding to the claim in time, and the explanation for any delay in making the application to set aside. This, of course, is in keeping with the prerequisites that must be satisfied pursuant to the rules.”*

Furthermore, according to Craig Osbourn Civil Litigation Practice Guides 2005-2006, Page 364, the Defendant must file evidence to persuade the Court that there are serious issues which provide a real prospect of him successfully defending the claim. The evidence filed must set out the case in sufficient detail to satisfy the test. The law is clear, the Affidavit must contain the facts being relied on and the draft Defence should be exhibited.

In the case of **Evans v Bartlam** [1937] A.C 473, it was said that before a judgment regularly obtained could be set aside, it ought not to be granted except for sufficient cause shown. The authorities mentioned in paragraphs 10 – 12 (inclusive) demonstrate that there must be an Affidavit of Merit and a Defence which provide the court with sufficient evidence to persuade that there is a real prospect of the Defendant successfully defending the claim. However, in exercising the discretion whether or not to set aside a judgment regularly obtained the court must also examine the matters set out in rule 13.3(2).

DISCUSSION & FINDINGS

Is there a defence with a real prospect of success?

[13] In outlining his defence, Mr. Brown asserts in his affidavit inter alia:

“That the proceeds of sale are now in possession of Tracey Ann Long, Attorney-at-Law. The Claimant has not yet produced a duplicate Certificate of Title with respect to an abandoned road, part of the hotel property to be duly endorsed in the name of the registered owner and the issue of the abandoned road on the property remains unresolved. Mr. Brown further added that an Undertaking was issued by Ms. Tracey Ann Long, Counsel for the mortgagee in the sale proceedings on June 13, 2007.”

- [14] Mr. Brown submitted that though the proceeds of the first original sale involving the Defendant are in possession of Ms. Long, she has properly and lawfully retained same. The Claimant therefore has not completed the required work. Additionally, on diverse occasions, the Defendant has given the Claimant the amount of J\$175,000.00 and also an amount of J\$245,000.00 for which the Defendant received no receipts. The Claimant represented in writing to Ms. Long that he was willing to accept the amount of US\$5,000.00 in legal fees for the work done and this amount was paid to the Claimant by Ms. Long as evidence by a letter dated June 2, 2016.
- [15] The Defendant contends that arising out of the sale of the hotel in 2007, a Chattel Agreement had been prepared, dealing with the movable assets at the hotel. That the Defendant owned a generator, which was at the hotel and which was no part of the sale or Chattel Agreement. When he went to retrieve it the principals of the new owner/transferee called the police. This matter was satisfactorily resolved, no legal fee was ever quoted to the Defendant by the Claimant nor was the Claimant acting on the Defendant's behalf.
- [16] The Defendant denies requesting any personal loans from the Claimant and denies signing any exhibited agreement. His case is that he was asked to sign a Consent and Authorization in relation to the sale matter, but that at the time of signing, the document was a blank page, as he was told by the Claimant that the wording would be filled in by the Claimant at a later date. Further, the Defendant did not sign a document before or in the presence of any Justice of the Peace as stated by the Claimant and puts the Claimant to strict proof of same.

- [17] The Defendant has not only convincingly refuted the Claimant's claim in his affidavit and proposed Defence, but has also exhibited an Undertaking issued by Ms. Tracey Ann Long, Counsel for the mortgagee in the sale proceedings, where, it was indicated by Ms. Long that:

"My instructions are that I am to disburse US\$400,000.00 once my client's mortgage has been registered on the Certificate of Title registered at Volume 1345 Folio 939 of the Register Book of Titles. Am to disburse the balance mortgage proceeds once Title to the abandoned road (which is part of hotel property) has been (i) issued under the Registration of Titles Act; and (ii) transferred to Mandolin Investment Group, LLC and (iii) mortgaged to my client."

Accordingly, that statement highlights the fact that the Claimant may not have completed the matter undertaken, as asserted by the Defendant in his affidavit and proposed defence; as the Claimant is yet to produce a duplicate certificate of title with respect to the abandoned road, a part of the hotel's property.

- [18] Further, no reference is made by the Claimant, to receiving any amount as payment for legal fees for work done by the Defendant. However, in addition to asserting that the Claimant has been given the amounts of J\$175,000.00 and J\$245,000.00 as payment for legal fees, the Defendant has also exhibited two (2) letters; one in which the Claimant had indicated his willingness to accept US\$5,000.00 for legal fee in the sale of land and the other, enclosed with a Scotia Bank draft in the sum of US\$5,000.00.

- [19] An examination of the evidence in support of the Defendant's application reveals that the Defendant has produced to the court, affidavit evidence that there is a prima facie defence; and has set out the proposed defence on its merits, which is further supported by several exhibited documents, to his proposed defence. The defendant has, to my mind, successfully shown that he has a real prospect of

succeeding on the claim; thereby satisfying the primary test for setting aside a judgment. I am of the view therefore, that there are live issues to be tried.

Whether the application was made promptly

[20] The rules provide that in considering whether to set aside a judgment, the court must consider whether the Defendant has applied to set aside the judgment as soon as was reasonably practicable after finding out the judgment was entered. Default Judgment was entered on the 13th June, 2017 and was served on March 16, 2018. The Claim Form and Particulars of Claim were received on March 30, 2017. The Acknowledgment of Service of Claim Form was filed on April 6, 2017.

It is noted that having been served with the Default Judgment on March 16, 2018, the Notice of Application to Set Aside Default Judgment was filed on March 21, 2018 a mere four (4) days after being served with the Default Judgment. Clearly the Defendant acted promptly in applying to Set Aside the Default Judgment. There has been no inordinate delay on the part of the Defendant in applying to Set Aside the Judgment.

Whether there is good explanation for failure to file a Defence

[21] The Defendant in explaining his failure to file the Defence in the time stipulated by the CPR, stated at paragraph 3 of his affidavit that he received the Claim Form and the Particulars of Claim along with Notices of Application for Court Orders and other remedies on March 30, 2017. He instructed his attorneys-at-law, O'neil Brown & Company to file an Acknowledgement of Service which they did on April 16, 2017. The Defendant explained that he suffers from a range of illnesses to include pancreatic cancer, diabetes, hypertension and other illnesses which often times require him to seek medical assistance, treatment and at times hospitalization. These services (inclusive of diagnostic tests and specialized machinery) are sometimes not available in this jurisdiction and even when so available are prohibitive in costs. This necessitates him travelling to the United States of America to seek treatment, tests and other services. In April 2017, he

became particularly ill and required medical testing and treatment including chemotherapy and radiation, which were done at Harvard University and Washington Adventist Hospital, both in Maryland, U.S.A. At that time the Defendant's health status made it impossible for him to supply his counsel with the necessary instructions, documentation and exhibits to properly and adequately draft, prepare and file his Defence in a timely fashion.

[22] The reasons advanced by the Defendant for not filing a Defence in the prescribed time is, to my mind acceptable as an explanation for his failure to file a Defence. The Defendant was well aware of the state of his ailments and the fact that he had to travel frequently to the United States of America may not have permitted him sufficient time to have supplied his Attorneys-at-Law with the necessary instructions, to properly and adequately prepare and file his Defence. The Defence should have been filed on May 11, 2017, but was filed on May 24, 2017. The delay in filing was not excessively long given the circumstances outlined by the Defendant at paragraph 3 of his affidavit.

Should the judgment be set aside?

[23] Having examined all the circumstances, in addition to their existing a real issue to be tried, I am of the view that the Defendant has satisfied the primary test for setting aside a default judgment regularly obtained, as he has demonstrated that he has a real prospect of successfully defending the claim.

[24] Accordingly, I accept the Defendant's explanation for his failure to file a Defence in the prescribed time and am satisfied that he acted as soon as was reasonably practicable to have the Default Judgment set aside. In the circumstances, the Default Judgment is hereby set aside.

[25] Having considered all the above factors and bearing in mind that the most important consideration is that the proposed Defence has a real prospect of success, I make the following orders:

1. Judgment in default of Defence entered on June 13, 2017 is set aside.
2. That the Defence filed on May 24, 2017 is to stand.
3. The matter is to proceed to Case Management Conference (CMC) on
November 29, 2018 at 2:30p.m. for ½ hour.
4. Costs to the Claimant to be agreed or taxed.
5. Applicant's Attorney-at-Law to prepare file and serve this Order.