



[2013] JMSC Civ. 188

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

**CLAIM NO. 2010 HCV 05818**

**BETWEEN                      SANMERNA PAPER PRODUCTS LIMITED                      CLAIMANT**  
**A N D                              SEAN STENNETT                                                              DEFENDANT**  
**(t/a Neas Distributors)**

Mr. Ronald Paris, Miss Kerry-Ann Sewell and Mr. Chumo Paris and for the applicant/defendant

Mr. Alando Terrelonge and Miss Kristina Excell for claimant/respondent

**HEARD:      17<sup>th</sup> October 2012, 19<sup>th</sup> January 2013, 11<sup>th</sup> February 2013, 8<sup>th</sup> April 2013, 29<sup>th</sup> May 2013, 28<sup>th</sup> November 2013 and 3<sup>rd</sup> December 213**

**APPLICATION TO SET ASIDE DEFAULT JUDGMENT – WHETHER PARTICULARS OF CLAIM SHOULD HAVE BEEN FILED – WHETHER THE PROPER PARTY WAS SUED – THE OVERRIDING OBJECTIVE CIVIL PROCEDURE RULES 8, 12, 13 – THE OVERRIDING OBJECTIVE RULE 1.1**

**BERTRAM-LINTON  
MASTER-IN-CHAMBERS (AG.)**

[1] Mr. Sean Stennett the defendant has applied to the court on 6<sup>th</sup> June 2012 seeking the following orders:

1. that the judgment entered herein in default of Defence on the 24<sup>th</sup> March 2011 and all subsequent proceedings be set aside.
2. that the Defendant may be at liberty to defend the claim by filing his Defence and
3. that the Claimant pay the Defendants' costs of and occasioned by the said judgment and subsequent proceedings and of this application to be agreed or taxed.

[2] In this regard Mr. Stennett says the wrong party was sued since he never had any business with the Claimant in his personal capacity but always through his limited liability company Neas Distributors Limited.

[3] Further he contends that Sean Stennett (t/a Neas Distributors) is not a legal entity/business name and so cannot be sued in the way he has been.

[4] He also takes issue with the claimant's compliance with part 8.2(1)(a) of the CPR as no Particulars of Claim was filed or served on him.

[5] In his Affidavit in support of this application he outlines that he never contracted with the Claimant in his personal capacity and depones that whatever money may be owed would be by the company. He exhibits the Certificate of Incorporation of the Company dating back to 19<sup>th</sup> January 2005 as well as other company documents.

[6] Copies of several cheques are also attached evidencing payments by Neas Distributors Limited to the Claimant's company for a period between October 2008 to November 2009.

[7] A "defence" is attached which in large measure repeats the defendant's contentions of wrong party sued made in the application and quite significantly stating that he has no documentary evidence of payments from his company to the claimant for the periods claimed as these were 'lost' as a result of a relocation of his residence in January 2012. He repeats the theme. If any money is owed to the claimant, it is the company that is answerable and not him.

## **THE LAW**

[8] Under our Civil Procedure Rules Part 13.3(1)

*"The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim."*

Rule 13.3 further says

*"(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 is reasonably practicable after finding out that the judgment has been entered.*
  - (b) given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be*
- (3) where this rule gives the court power to set aside a judgment, the court may instead vary it.”*

[9] From the CPR and the relevant authorities it may be concluded that the central consideration to set aside a default judgment regularly obtained is whether the defendant has a real prospect of successfully defending the claim. This must be more than fanciful.

### **Per SWAIN v HILLMAN AND ANOR [2001] 1 ALL ER 91**

The first issue I will deal with is:-

#### **THE REQUIREMENT FOR FILING PARTICULARS OF CLAIM**

[10] Rule 8 speaks to how Civil Proceedings are initiated in the Supreme Court here in Jamaica. This is done generally by filing and serving a claim form and particulars of claim.

[11] Rule 8.1(1)(b) says Particulars of Claim “must” be filed.

*“1. unless rule 8.2(1)(b) or 8.2(2) applies –*

- i. the particulars of claim, or*
- ii. where any rule or practice direction so requires or allows, an affidavit or other document giving the details of the claim required under this part.”*

[12] Rule 8.2(1)(a) permits a litigant to issue and serve a claim form without the particulars of claim “only if”

*“(a) the claimant has included in the claim form all the information required by rules 8.6, 8.7, 8.8, 8.9 and 8.10 ...”*

## Rules

- 8.6 deals with declaratory judgments
- 8.7 addresses the contents of the claim form
- 8.8 deals with the contents of fixed date claim form
- 8.9 speaks to the claimants duty to set out his case and
- 8.10 deals with certificates of value

[13] The relevant rule here then is rule 8.7 which indicates the contents of the claim form in the absence of Particulars of Claim.

[14] Rule 8.9 (1), (2) and (3) are also of some relevance especially as the defendant raises the issues of the lack of the Particulars of Claim.

### **THE SUBSTANTIVE CLAIM**

[15] On 22<sup>nd</sup> November 2010 the claimant filed a claim form seeking payment of *“monies due and owing by the defendant to the claimant under contracts made between the parties between January 2010 and April 2010.”* The Amount claimed is Two Million Two Hundred Twenty-Seven Thousand Seven Hundred Ninety-Two Dollars and Twenty-Eight Cents (\$2,227,792.28).

[16] The Claim Form goes on to outline the relationship that the parties enjoyed which led to the money becoming outstanding (paragraph 1-5) as well as the remedy sought (paragraph 6 and 7).

[17] The claimant's normal place of business is also stated (paragraph 1) as well as the address and contact numbers of the attorney filing on behalf of the claimant and the claimant's business address.

[18] Attached to the claim form are several invoices on which the claimant relies. All twelve (12) are stated to be for the Account of Neas Distributors of 13 Harbour Drive Freeport, Montego Bay and most 8 out of 12 showing that goods were received by Sean Stennett, these are not denied. This document in our context then has satisfied the criteria for the non filing and non serving of particulars of claim as permissible pursuant

to the rules, that is, Rule 8.7 (as to the required contents of a claim form) that is, if it sets out all the matters required by the CPR to be set out in place of the Particulars of Claim.

[19] I find therefore that the claimant has satisfied rule 8.2(1)(a) of the CPR and as such ground three (3) of application fails also Acknowledgement of Service was filed and served on 1<sup>st</sup> February 2011 on defence behalf.

## **ANALYSIS**

[20] Mr. Paris in his submissions says as well that there are invoices included in the claim for which there is no proof of receipt by the defendant of the goods, and as such questions should be raised as to the veracity of a claim for those amounts. He highlights a pattern of dealing between the parties evidenced by the cheques exhibited as a good indication that the claimant always knew who they were contracting with.

[21] It was only in May 2012 he says that the default judgment was brought to Mr. Stennett's attention and he made his application as soon as he could.

[22] Stennett's Supplemental Affidavit also spoke to his financial constraint as his reason for not having responded to the original claim.

[23] Mr. Paris submits that these all should be seen as favourable to the defendant's application and overwhelmingly that he has a reasonable prospect of success in defending the claim.

[24] Miss Excell for her part says that every step of the way the defendant has been tardy.

[25] He was always aware of the claim from the point of service as an Acknowledgement was filed on his behalf.

[26] She exhibits uncontroverted emails from Mr. Stennett to Mr. White admitting to the debt and promising to pay the outstanding amounts. See Affidavit of Robert White filed on 6<sup>th</sup> July 2012 which exhibits.

- email to Sanmerna @yahoo.com dated Friday May 28, 2010 at 5:59am for the

Attention of Mrs. Bloomfield.

*“This email is to outline to you the time in which I will be able to pay the balance of \$2,000,000 Jamaican dollars outstanding to our company and what I am doing to get this done.”*

and further in the document

*...“I am asking for some time to have this done, I am looking at settling this amount within (3) to (4) months could be earlier, I am planning to take out a loan for the (2) million but need to have an income in order to do so.”*

Again in email dated September 2, 2010 about two (2) months before the claim was filed

*“I will be able to start making payments to the accounts starting this month, I have started trading since last month, ...”*

[27] Miss Excell further contends that Mr. Stennett assumed personal responsibility for the debts. In the emails this is borne out, and certainly the rebuttable presumption must be that as the person conducting business on the company's behalf he would sign the emails even though not specifically stating this to be on behalf of the company.

[28] This debt, all agree, was incurred by the company. This is obvious and unrefuted and seemed conceded by the correspondence. The assertion that the emails indicate that he subsequently took personal responsibility for their repayment, could only be so if she presumed that in the beginning the debt was not his, but certainly leads to the possibility of personal responsibility been taken by the defendant for the debt.

## **THE REMAINING ISSUES**

[29] In addressing the remaining issues I must then consider:

1. The effect of the defendant being sued in his personal capacity.
2. Whether the applicant has a real prospect of successfully defending the claim such that it would warrant a setting aside of the default judgment herein.
3. The overriding objective and how best it would be served in the current circumstances before us.

## **THE DEFENDANT BEING SUED IN HIS PERSONAL CAPACITY**

[30] In this regard **PALIN v DUXBURY [2010] ABQD 833** is quite instructive.

[31] This case was one where judgment was entered against the defendant in her personal capacity. In her application to set it aside she asserted among other things that all her dealings with the claimant were as a director of the company and that if she did make representations personally the claimant did not reasonably rely on them.

[32] Here as in our case the contracts were oral and there were written receipts for goods purchased. However in that instance there was never any dealings between the parties which indicated that her company was involved unlike in our case where the claimant's own claim form exhibits invoices directed at the defendant's company which are all said to be due and owing. However, the defendant in his email contacts spoke to the same debt, promising to pay and signing his name to the email in much the same way as he signed in receipt of much of the goods delivered on eight (8) of the twelve (12) invoices.

[33] So that in the case before us there is evidence that suggests a triable issue that Stennett was not acting in his personal capacity. In fact all the circumstances including the emails and the substantive claim would suggest he was always speaking to the debt owed in relation to Neas Distributors his company. Unless there is something expressly negating this assertion this may well provide the defendant with good grounds for a defence but ...

## **IS THERE A REAL PROSPECT OF SUCCESSFULLY DEFENDING THE CLAIM**

[34] In assessing this I must consider that the default judgment held by the claimant has a value and the claimant should not be deprived of it without good reason (**per MOORE-BICK J in INTERNATIONAL FINANCE CORPORATION v UTEXAFRICAN SR PL [2001] LTL May 16**).

*"It is for the defendant to satisfy the court that the claimant should be deprived of his default judgment or that it should be varied."*

[35] Even where the court finds that there is a real prospect of a successful defence courts are reluctant to set aside a judgment properly obtained and extend time to file a Defence if there is no reasonable explanation for failure to comply with the rules laid down.

### **THE PROPOSED DEFENCE**

[36] Mr. Stennett's defence focuses mainly on the issue of the company vs himself and who is the proper party this has been dealt with by this court. Significant as well are his affidavits which Miss Excell rightly points out do not deny that the debt is owed but speaks to who it is owed by. The defendant filed an Acknowledgement of Service but state his reason now for not defending as financial constraints (see Supplemental Affidavit of Sean Stennett filed June 9, 2012). No details are given as to the reason he was in a position to complete instructions to his attorney to file an Acknowledgement of Service but insufficient to enable them to file a defence. If the court is to exercise its discretion in his favour it cannot do so merely on a bare assertion.

### **EXPLANATION FOR THE DELAY**

[37] The defence proposed does not seem an overly complex one and in fact it does not refute or deny the factual substratum of the claim which is that money is owed upwards of two million dollars (\$2,000,000) based on dealings of the claimant either with himself or his company. Mr. Stennett as well in the court's view falls short of convincing the court there is a reasonable explanation for not defending in the time required. The explanation is inadequate since it would appear that having filed an Acknowledgment, nothing was done until a default judgment was entered. The correspondence herein shows that approaches had been made well before the suit was filed and there was an admission in them as to debt. It would seem that the defendant was only motivated after it became obvious that the claimant was serious about proceeding.

[38] In these circumstances the court does not accept that the inability to afford his Attorney without more details is a good excuse not to file a defence or even proceeding with some form of negotiation to settle an admitted debt.

## **THE OVER-RIDING OBJECTIVE**

[39] The over-riding objective in dealing justly with matters before the court and in this particular context is best achieved if one looks at the possibilities for the scenario before the court.

### **Scenario 1**

[40] If the defendant's application is granted; at its shaky best the defence filed is likely to result in the indebtedness moving from the person Sean Stennett to the company Neas Distributors Limited. The proposed defence does not meet the merits of the case so far as the debt is concerned.

See paragraph 8 of Affidavit of Sean Stennett filed on June 6, 2012.

*"Accordingly the claimant Robert White well knew prior to filing this claim that I carried on business with them as Neas Distributors Ltd and that is my defence to this claim in addition to the failure of the claimant in not serving me with any Particulars of Claim nor with any explanation for failing so to do. Whatever monies which may be owed to the claimant is owed by Neas Distributors Ltd not by me personally."*

and paragraph 6 of Proposed Defence filed as attachment exhibit SS3 to the Affidavit of Sean Stennett filed on June 6, 2012.

*"Accordingly during the business period claimed in the Claim Form I paid the claimant on a credit basis but I do not have any cheques or any documentary record of payments made by Neas Distributors Ltd to the claimant during that period. I lost all these documents when I moved my residence from Norwood in the parish of St. James to Granville in the said parish in January 2012."*

### **Scenario 2**

[41] On the other hand if the application is not granted then Sean Stennett will be given an opportunity to make good on the promises contained in the emails dated Friday May 28, 2010.

*"This email is to outline to you the time in which I will be able to pay the balance of \$2,000,000 Jamaican dollars outstanding to your company and what I am doing to get this done..."*

*Sorry for the inconvenience this ha(s) caused, I am committed in getting this done as soon as possible without further inconvenience to your establishment. It is not my intention to have this money owing to you.*

*Best Regards*

*Sean A. Stennett*

## **CONCLUSION**

[42] The defendant has failed to satisfy the court that taking all the considerations into account that:-

- a) there is a substantial reason for setting aside the default judgment based on the assertion that the company should have been sued and not him in his personal capacity.
- b) there is a real prospect of successfully defending the claim.
- c) the over-riding objective would best be served by a substitution of the company for himself as the defendant.

[43] For these reasons the application to set aside the default judgment and all subsequent proceedings is refused. The matter should proceed to Assessment of Damages on 28<sup>th</sup> March 2014. The defendant is to pay the claimant's cost of this application to be agreed or taxed.

[44] Leave to appeal is granted to the defendant on his application.