[2019] JMSC Civ. 30

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV 04740

BETWEEN	**SIMON (by mother and Next Friend Jacinth Simon)**	**CLAIMANT**
AND	**Donavon Hutchinson**	**1ST DEFENDANT**
	Anthony Hutchinson	**2ND DEFENDANT**

IN CHAMBERS

Application to set aside Default Judgement.

Mr. Raymond Samuels, Attorney-at-Law of Samuels & Samuels Attorneys-At-Law for the Claimant/Respondent

Mr. Lemar Neale, Attorney-at-Law of Nea/Lex Attorneys-at-Law for the Applicant/1st Defendant

Heard: 15th January 2019 and 15th February 2019

CORAM: SHERON BARNES, J (AG.)

[1] The First Defendant Mr. Donovan Hutchinson, on August 29, 2016 filed an Application to Set Aside the Default Judgment against him entered on 29th October 2012 and assessed on 9th July 2013, on the basis that the Claim Form and Accompanying documents were not served on him by process server Mr. Norman

Blackwood. Said process server claimed he effected personal service on Friday, September 14, 2012.

[2] The application is made by virtue of Part 13 of the Civil Procedure Rules 2002.

[3] In his Affidavit of Service dated September 25, 2012 and filed on October 12, 2012, Mr. Blackwood said he served the documents on the First Defendant at 55 Iter Borale Housing Scheme, Annotto Bay, St. Mary when said First Defendant "admitted that he was the First Defendant herein" (paragraph 6).

[4] Mr. Blackwood, in this hearing, was cross-examined by the First Defendant's/Applicant's Attorney-at-law, Mr. Lemar Neale. In his evidence Mr. Blackwood pointed to the First Defendant who was present and sitting across from him and said he "would look like the person". He said he had met/saw the First defendant some two (2) years before in the guard room of the Annotto Bay police station.

[5] He further described his visit to Iter Borale Housing Scheme, asking for directions, going to a house, asking for "Hutchie" and handing the documents to that person – said one he now says "look like the person".

[6] The court agrees with Mr. Neale that Mr. Blackwood seems unsure of who he served the documents on and cannot definitively state if this is the person upon whom they were served.

[7] But the court is also mindful that this took place some years ago, six years and four months to be exact, and memories fade so it would be difficult to recall with clarity, the details of service.

[8] This is indeed an issue of Credibility – whether the court believes and accepts the evidence of Mr. Blackwood that he served the documents on Mr. Donovan Hutchinson. Mr. Blackwood did not come across as incredible – he spoke the truth. Instead of making statements to convince the court of his absolute surety, he simply, and indeed honestly, said what transpired on the day in question.

[9] There is no assertion that he went to the wrong address.

[10] Donavon Hutchinson's (First Defendant's) affidavit is that he works in Kingston and on Friday afternoons engage in domino playing before going home and would not have been home at 4:30 p.m. – the time Mr. Blackwood said he saw and served him there. The court has seen no documentary or other evidence in proof of that. And in any event, it could never be that he has not deviated from that practice, that is, taken leave or been ill and at home on a Friday afternoon.

[11] The court accepts Mr. Blackwood as a witness of truth, one upon whom it can rely. There is no doubt – on a balance of probabilities – that Donavon Hutchinson was served with the Claim form and supporting documents on Friday September 14, 2012.

[12] In fact, the documents subsequently served by registered post were sent to that same address and there's nothing before the court to intimate that they were not received or that they were returned to the Claimant's Attorney.

[13] But that finding, on its own, is not sufficient to set aside the default judgement regularly obtained. It is Rule 13 of the CPR and the authorities which must guide that decision.

[14] Rule 13.2 (1) (a) & (b) sets out the circumstances under which a Default Judgement must be set aside.

[15] There is no issue here with the service of various subsequent court documents/orders upon said Defendant by registered mail. It was after he became aware of an order for Seizure and Sale of goods to satisfy the Judgment, that he sprung into action and filed his Acknowledgement of Service and Application to set aside the judgment.

[16] The Court also examined the authorities relied on by the Applicant/Defendant's Counsel. In ***Mighty v Wilson and others****,* 2005 Judgement of Justice Sykes (as he then was) the same issue of service was raised, but in that case there was a

difference between where the Defendant was served as against where he actually lived.

[17] In the ***Joseph Nanco v Anthony Lugg & Another*** case (2012) the contention was that the judgment was irregularly obtained as documents which should have been served with the claim form were not; plus there was the question of whether the default judgement was regularly obtained or not. No such assertions arise here.

[18] The Court is also mindful of Rule 13.3 – that the judgment should be set aside if the "defendant has a real prospect of successfully defending the claim".

[19] Mr. Hutchinson's Defence accompanying his Application to set Aside the Default Judgment, is dated 24th August 2016 and filed 29th August 29, 2016. The court has not seen a defence set out in said document other than him stating at paragraph 4 that he denies negligence, and further on he admits to having a conversation with the mother of the injured child.

[20] In his supplemental affidavit filed on July 27, 2017 he denies control over the 2nd Defendant who was the driver at the material time. The subsequent paragraphs do not set out any real prospect of successfully defending the claim and there is no affidavit from the 2nd Defendant/driver.

[21] I stand guided by Justice Sykes's Judgement in ***Saunders v Green & Others*** of 2007, and direct you to paragraph 22 which succinctly defines the term used in Rule 13.3:

> *22. "In the new rule 13.3 the sole question is whether there is a real prospect of successfully defending the claim. This test of real prospect of successfully defending the claim is certainly higher than the test of an arguable defence (see **ED&F Man Liquid Products v Patel & ANR** [2003] C.P. Rep 51). Real prospect does not mean some prospect. Real prospect is not blind or misguided exuberance. It is open to the court, where available, to look at contemporaneous documents and other material to see if the prospect is real. The court pointed out that while a mini-trial was not to be conducted that did not mean that a defendant was free to make any assertion and the judge must accept it. This, in my view, is good sense and good logic…."*

[22] So, there is no defence set out by Mr. Hutchinson with a real prospect of success on the merits.

[23] As such, the court makes the following orders:

1. The first Defendant's notice of Application for Court Orders filed on August 29, 2016 for Judgment in Default of Defence entered on 29th October 2012, and assessed on 9th July 2013 to be set aside, is refused.

2. Cost to the Respondent/Claimant to be agreed or taxed.

3. Leave to appeal refused.

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SHERON BARNES
JUDGE (AG.)