[2018] JMSC Civ. 123

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016 HCV01867

BETWEEN	**SHUANA SMITH**	**1st CLAIMANT/1st RESPONDENT**
AND	**AAYANA BENT (a minor, by her mother and next friend SHAUANA SMITH)**	**2nd CLAIMANT/2nd RESPONDENT**
AND	**GLADSTONE SHACKLEFORD**	**1st DEFENDANT/1ST APPLICANT**
AND	**EUGENE POLSON**	**2nd DEFENDANT/2ND APPLICANT**

IN CHAMBERS

Mr. Kevin Williams instructed by Messrs. Grant, Stewart, Phillips & Co., for the Claimants/Respondents.

Ms. Althea Wilkins & Ms. Keisha Grant instructed by Dunbar & Co., for the Defendants/Applicants.

HEARD: January 19 and July 6, 2018.

Default judgment – Application to set aside default judgment – Criteria to be satisfied – Definition of 'real' in real prospect of successfully defending Claim – whether Ancillary Claim filed is a nullity

PALMER HAMILTON, J. (AG.)

Background

[1] This Claim is one for damages for negligence arising out of a motor vehicle accident which occurred on March 2, 2015 along St. Margaret's Bay main road in the parish of Portland. The accident involved a motor vehicle registered PF 3184 which was owned by the 1st Defendant and driven by the 2nd Defendant and the

1st and 2nd Claimants were its passengers. As a result of the accident, the Claimants sustained injuries. The Defendants contend that the motor vehicle registered PF 3184 collided into the rear of a motor truck that was stationary along the St. Margaret's Bay Main Road and as a result of this, the owners of the motor truck were negligent or contributed to the accident in which the Claimants were injured.

[2] However, what is properly before me is an interlocutory application for the default judgment entered on the 10th of March 2017 to be set aside pursuant to rule 13.3 of the Civil Procedure Rules 2002 (hereinafter referred to as the CPR).

Applicants' Submissions

[3] The applicants stated that their application meets the requirements of the law for setting aside default judgments regularly entered. They indicate that their application is supported by the affidavit of the 1st Defendant, Gladstone Shackleford which also exhibited the Draft Defence. They further submitted that this draft defence reveals that they have a defence that has a real prospect of success. In addressing the issue of delay, the applicants submitted that their actions were not dilatory in bringing their application to the court, and further, that this was a proper case for this court to favourably exercise its discretion and avoid injustice.

Respondents' Submissions

[4] The Respondents contend that the applicants have not precluded any or sufficient evidence to meet the three (3) criteria set out in rule 13.3 of the CPR. They further submitted that the proposed defence had no real prospect of success. In precluding a chronology of events, the respondents submitted that the applicants provided no evidence to justify why their application to set aside the default judgment was made approximately four (4) months after they were notified of the default judgment being entered.

Law and Analysis

[5] Rule 13.3 of the CPR stipulates:

> *"(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.*
>
> *(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 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."*

[6] It is therefore evident that three (3) criteria must be satisfied in order for the Court to exercise its discretion in setting aside a default judgment. Though there are three (3) distinct criteria, there is an order of precedence which is even evident in the manner in which each criterion is listed. The first is that the defendant must demonstrate that he/she has a real prospect of successfully defending that Claim. This was endorsed by Phillips, JA, in the case of **Rohan Smith v Elon Hector Pessoa and Nickeisha Misty Samuels** [2014] JMCA App 25 at paragraph 26:

> *"The wording of the rule is clear: although there are three considerations mentioned, the primary consideration is whether the defendant has a real prospect of successfully defending the claim or, put another way, whether there is a defence that has merits....Therefore, it would seem to me that for the applicant to succeed in his application for leave, he must demonstrate that he has a real and not fanciful, chance in the appeal of showing that the judge was wrong in concluding that the judgment should be set aside*

because…the respondents had a real prospect of successfully defending the Claim."

[7] In my view; it is elementary that this requires careful and almost clinical examination of the affidavits of the 1st Defendant, Mr. Gladsone Shackleford and also the exhibited proposed defence. Before so doing, I will examine the other two (2) criteria that being, the application to set aside default judgment must be made as soon as reasonably practicable after finding out that judgment has been entered and, that there ought to be a good explanation for the failure to file an acknowledgment of service in time.

[8] The expression "reasonably practicable" has not been defined and what is considered "reasonable" can only be determined on a case by case basis, in other words, what is "reasonably practicable" is dependent on the circumstances of each application or case.

[9] In the case of **Sydney Malcolm v Metropolitan Management Transport Holdings Ltd., and Glenford Dickson** (unreported), Supreme Court, Jamaica, Claim No. C.L. 2002/M225, judgment delivered 21st of May, 2003, Mangatal, J (Ag.) (as she then was) stated that a period of delay of approximately two (2) months between entry of the default judgment and the filing of the application to set aside was not considered to be inordinate and as such did not cause excessive prejudice to the Plaintiff. Mangatal, J further stated at paragraph 20 while making reference to the case of **McDonald v Thorm**, **TLR**, October 15, 1999, 691 that:

"...the question of delay, and whether reasons are or are not given is but another factor to be put in the scale when the Court considers how best to exercise its discretion."

[10] In my view, the discussion of Mangatal, J in the **Sydney Malcolm** case with respect to the setting aside of the default judgment was influenced by the overriding objective of doing justice between the parties (rule 1.1 of the CPR).

[11] In another scenario dealt with in the **Rohan Smith** case, Phillips, JA in the face of a four (4) months delay, had this to say at paragraph 39:

> *"There is no requirement expressed in rule 13.3 (2) for an explanation to be given for the delay, but, it seems to me that a defendant who has failed to apply for relief against the default judgment obtained against him as soon as is reasonably practicable after finding out about it should proffer an explanation for failing to do so. There are authorities to the effect that if there is no explanation for the delay then no indulgence or relief should be granted...However, the overriding factor is whether the defendants, in this case the respondents, had a real prospect of successfully defending the claim, and the consideration of whether the application was made timeously is* ***merely a factor*** *to be borne in mind and ought not by itself to be determinative of the application." (My emphasis)*

[12] Phillips, JA further stated at paragraph 44 that:

> *"a period of four or five months, even in light of the history of the matter.....ought not to be regarded as inordinately long."*

It is this principle upon which learned counsel, Ms. Althea Wilkins, has relied in support of her application on behalf of the applicant to set aside the default judgment. I agree that the delay of four (4) months in the instant case is not considered to be inordinate in light of the cases referenced above. I also find that the explanation proffered by learned counsel Ms. Racquel Dunbar in her affidavit, though not necessarily a good one is satisfactory.

[13] However, what is paramount, as I stated earlier, is whether I am satisfied that the applicants have a real prospect of successfully defending the Claim and if I so find, then the absence of a good explanation for the delay would not necessarily

operate as a bar to prevent me from exercising my discretion to grant the applications.

Real Prospect of Successfully Defending the Claim

[14] In making this determination I must bear in mind that at the interlocutory stage I am not expected to conduct a mini trial and I should "be wary to resolve issues of fact on affidavit evidence yet untested. (Per Daye, J in the case of **Michelle Daley** and **Shantell Diggan v Tongo Melvin and Beverly Stewart**, Suit No. CL 2002/D-034).

[15] I also take into consideration that the interpretation of "real" in the phrase "real prospect" connotes a realistic as opposed to fanciful prospect of success (see **Swain v Hillman**, [2001] 1 All E.R. 91).

[16] A careful analysis of this standard was embarked on by Mangatal, J in the **Sydney Malcolm** case. In dealing with what is meant by a real prospect of successfully defending the Claim, Mangatal, J stated at page 5, paragraphs 13, and 14:

> *" that an arguable case must carry some degree of conviction but that judges should be wary of trying issues of fact on affidavit yet untested. To do so is to usurp the function of the trial judge ... a real prospect succeeding ought not to be elevated into a real likelihood of the Defendant succeeding .... it will be inappropriate to find that there is no real prospect of success where there are vital disputes as to facts to be resolved."*

[17] I found Mangatal, J's analysis of the test to be used to be very instructive and I adopt it wholeheartedly. Mangatal, J. also stated at paragraph 18 that:

> *"the correct application of the test does not involve an analysis at this stage of whether the Defendant has a real likelihood as opposed to a real and not fanciful prospect of succeeding. That is why one does not at this stage examine the Affidavits and opposing factual disputes to assess what the*

likely outcome will be. Indeed what may appear to be a weak case will still be a case with a real prospect of success, where the issues are joined in reality. The weakest case on paper may be bolstered by powerful credibility when the witnesses give their evidence, or in contrast, the strongest case may be completely eradicated by powerful cross-examination. What the Court must satisfy itself of is that what is raised by way of evidence at the hearing of the application is the gravamen of a real and not fanciful defence."

[18] In my view, the salient issue is whether the affidavit of the 1st Defendant is an affidavit of merit.

Gladstone Shackleford's Affidavit and the Proposed Defence

[19] The 1st Defendant's affidavit was filed on December 12, 2017 and he deposes that he was "duly authorised to depone (sic) to this affidavit on behalf of the 2nd Defendant" as he was an employee of his. He also stated that the 2nd Defendant was employed by him during the period of March, 2015 and was his authorized driver/servant/or an agent. Mr. Shackleford, at paragraph 15, then states:

> "*that we have a good defence on its merits with a real prospect of success to the claim made against us in that the accident was caused solely by or substantially contributed to by the driver and driver of motor vehicle licenced CG 3582. Corey Cunningham and Vemar Bell were the registered owners at the material time when their vehicle was illegally and improperly parked along the roadway thereby causing and (sic) obstruction of traffic and hindering the lawful use of the roadway and blocking off most of the 2nd Defendants lane on the brow of a hill. The said truck obstructed the lawful use of the road when Mr. Polson was driving along in his lawful lane in the direction of Buff Bay, at about 5:15p.m when the sun's glare affected his vision and my bus collided into the rear of the parked truck owned by Corey Cunningham and Vemar. The*

> *defendants further deny owing the Claimants any duty of care and will challenge that the Claimants were involved in the accident and suffered injuries, loss and damage as a result of the said accident."*

[20] Learned Counsel for the Respondents, Mr. Kevin Williams, in critiqueing the affidavit, submitted that since Mr. Shackleford was not present on the scene of the accident he would not be suitable as an affiant because he was not a witness as to fact. Mr. Williams further submitted that an affidavit of merit must come from the person with actual knowledge of the facts on which the purported defence is to find its foundation.

[21] In my judgment, however, if Mr. Shackleford had even indicated in paragraph 15 of his affidavit that he was informed by the 2nd Defendant, Eugene Polson and that he verily believed that the events unfolded as he outlined, then his affidavit could be accepted as an affidavit of merit. Mr. Shackleford's affidavit was devoid of any such indication and as such would be disqualified as a competent deponent to an affidavit of merit. I would agree with learned counsel Mr. Williams that neither Mr. Shackleford nor Ms. Dunbar nor Ms. Williams could depone to the affidavit of merits.

[22] In my view the case of the **Attorney General of Jamaica** v **John McKay** [2012] JMCA App 1 relied on by learned counsel, Mr. Williams is very instructive in this regard.

[23] Morrison, JA (as he then was) stated at paragraph 23 that:

> *"...an affidavit sworn to by the defendants solicitor, in which there was nothing to suggest that the solicitor had any personal knowledge of the facts of the case or that what happened in the draft defence exhibited by him was true, was not a sufficient affidavit of merit for the purposes of setting aside the judgment."*

Morrison, JA further stated that the "written evidence in support of the application to set aside will have to address [the relevant] factors and in particular the alleged defence on the merits."

[24] In my judgement having examined the proposed defence filed, I do not see even "seeds of a defence" in the document. The truck being parked and stationary along the roadway at the brow of the hill should have been an indication to the 2nd Defendant that he should proceed with greater caution and come to a complete stop if necessary and then make an attempt to pass the parked motor truck. In my view, I see no merit in this proposed defence as filed.

[25] In my judgement, the main criterion that the Defendant/Applicant has a real prospect of successfully defending the claim has not been met and there being no merit in the proposed defence and no affidavit of merits filed, the Notice of Application for Permission to File Defence Out of Time And Set Aside Default Judgment is refused and dismissed.

The Validity of the Ancillary Claim

[26] In my view, with the application to have the default judgment set aside being dismissed, this aspect would be purely academic. I will however, say a few words on the validity of the Ancillary Claim Form. Learned Counsel, Mr. Kevin Williams, submitted that any document filed by the Defendants after the 2nd day of June, 2016 when the default judgment was entered, is a nullity and is of no effect, and until the default judgment is set aside the Defendants are prohibited from filing any document in this action.

[27] Rule 18.5(1), (2) and (3) of the CPR state as follows:

> *"(1) A Defendant may make an ancillary claim without the court's permission if:*
>
> *(a) In the case of a counterclaim, it is filed with the defence; or*

(b) In any other case the ancillary claim form is filed before or at the same time as the defence is filed.

(This rule does not apply to an ancillary claim under rule 18.4)

(2) Where either –

(a) Rule 18.3, or

(b) Paragraph (1) does not apply, an ancillary claim may be made only if the court gives permission.

(3) An application for permission under paragraph (2) may be made without notice unless the court directs otherwise."

[28] I am persuaded by the case of **Delroy Rhoden v Construction Developers Associates Limited and Trevor Reid,** (unreported) Court of Appeal, Jamaica, [Supreme Court] Civil Appeal 42/2002, judgment delivered March 18, 2005, in which Downer, JA stated:

> *"The proceedings instituted…had a fundamental defect; they could not be commenced in the face of a judgment in default which had not been set aside."*

Panton, JA (as he then was) in the said case endorsed this point by quoting from the case of In **Re Smith American and Mexican Company, Ex Parte Bank of England** [1895] 1 Ch. 37 at page 51:

> *"It has always been the law that a judgment by consent or default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter."*

[29] In my view, it therefore stands to reason that the Ancillary Claim as filed, having not been filed with the Court's permission, cannot stand as filed and is therefore rendered a nullity.

Interim Payments

[30] The issue that must be determined at this stage is whether if the claim went to trial, the Claimant would obtain judgment against the defendant for a substantial sum of money or costs. In my view, the Claimants have a strong case against the Defendants in the case at instant.

[31] The Claimants must therefore prove, based on part 17 of the CPR, on a balance of probabilities that they would obtain judgment for a substantial amount of money or for costs.

[32] The applicable rule in the CPR, rule 17.6 (1) (d) states:

> *"The Court may make an order for an interim payment only if –*
>
> *a. …*
> *b. …*
> *c. …*
> *d. Except where paragraph (3) applies, it is satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of money or for costs…"*

[33] Additionally, in order to obtain an order for interim payment, the Claimant must satisfy the Court that the judgment will be for a substantial sum. Learned Counsel for the applicant, Mr. Williams, submitted that the Claimant/Applicant would be entitled to an award for General Damages in the range of $5 Million. This qualifies as a substantial sum and as such, this limb has been proven.

[34] In my judgment, the Court must approach such awards with utmost caution so as to avoid any overpayment of the Claimant. This point was endorsed by Simmons, J in the case of **Larson Higgins v M.T. Tajin**, [2017] JMSC Civ. 83 in which she relied on rule 17.6(4) of the CPR and also the case of **Stringman v McArdle** and stated as follows:

> *"....what the Court is concerned with in fixing the quantum is that it does not exceed a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered."*

[35] In my judgment the point now becomes a moot one due to the fact that there is no merit in the Defence. Therefore, the suitable sum that I will award in these circumstances is J$2.5 Million.

Disposition and Orders

[36]

1. Notice of Application per Permission to file Defence out of Time and set aside Default Judgment filed January 11, 2017 is dismissed.

2. Ancillary Claim and Ancillary Particulars of Claim filed on the 12th of September 2016 are rendered a nullity.

3. Interim Payments are granted in the sum of J$2.5 Million, and shall be paid to the 1st Claimant on or before the expiration of 28 days from the date of this order.

4. Costs to the Claimants/Respondents to be taxed if not agreed.

5. Assessment of Damages is set for the 22nd of February 2019 at 10:00a.m.

6. Leave to appeal not granted.