[2024] JMSC Civ 02

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020CV04402

BETWEEN	**KIMARLA TUMMINGS**	**CLAIMANT**
AND	**WINSTON BAKER**	**1ST DEFENDANT**
AND	**TENNEYSON FOSTER**	**2ND DEFENDANT**

IN CHAMBERS

Ms. Houston Thompson instructed by Dunbar & Company appearing for the 1st Defendant/Applicant

Ms. Jamila Maitland instructed by Campbell McDermott appearing for the Claimant/Respondent

Heard: November 14th, 2023 and January 12th, 2024

Civil procedure – Application to set aside default judgment pursuant to rule 13.3 of the Civil Procedure Rules – Application to extend the validity of the Ancillary Claim Form – Application to extend the validity of the Ancillary Particulars of Claim – Whether the Defendant has a real prospect of successfully defending the claim – Whether the Defendant has a good explanation – Delay – Risk of prejudice.

T. HUTCHINSON SHELLY, J

INTRODUCTION

[1] This matter concerns an application to set aside a Default Judgment entered against the 1st Defendant in favour of the Claimant which was heard on the 14th of November 2023. The application was filed by the 1st Defendant on the 16th of November 2022 in which the following orders are being sought:

1. *That the life of the Ancillary Claim and Ancillary Particulars of Claim be extended and the Ancillary Claimant be granted a further six (6) months after the expiration date has passed within which to serve same on all parties;*
2. *That personal service on the Ancillary Defendant be dispensed with;*
3. *That substituted service be effected on the Ancillary Defendant by serving the Ancillary Claim Form, Ancillary Particulars of Claim, Acknowledgement of Service of Ancillary Claim Form, Defence, Prescribed Notes to Defendant, Defence, Acknowledgement of Service of Claim Form, Claim Form and Particulars of Claim and all documents arising from the prosecution of this matter by way of registered mail to the last known address of the Ancillary Defendant being Cornwall District, Little River in the parish of Saint Jarnes;*
4. *Costs of this Application be costs in the claim; and*
5. *Such further, or other relief as this Court may deem just.*

[2] The grounds on which the Applicant is seeking the orders are: -

(a) *Rule 26. 1(c) permits the court to extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed;*
(b) *The court has powers to extend the life of the Ancillary Claim Form and Ancillary Particulars of Claim;*
(c) *That the Ancillary Claimant has not as yet been able to effect service on the Ancillary Defendant as he has not yet been located;*
(d) *The interest of justly disposing of this case.*

[3] The application was supported by two (2) affidavits which were sworn to by Ms. Racquel Dunbar, Attorney-at-Law and the Applicant, Mr. Winston Baker

respectively. The application of Mr. Baker exhibited a draft defence which outlines evidence which he contends is sufficient to show a real prospect of success. On the 7th of March 2023, the Applicant filed written submissions in support of the orders sought. Although Counsel for the Claimant indicated that the application is opposed, there were no affidavits or submissions filed in response to same. As it stands, the only evidence before the Court on the Claimant's behalf are the pleadings.

[4] The case for the Claimant as outlined in her pleadings discloses that on the 11th of April 2015, she was a passenger in a motor vehicle which was travelling along the Reading main road in St James. A motor vehicle which was owned by the 1st Defendant and being driven by the 2nd Defendant was observed travelling in the opposite direction when it crossed over into the path of the vehicle in which the Claimant was seated, thereby causing a collision. The Claimant suffered injuries and loss and subsequently filed this action in which she seeks damages for the negligent conduct of the 2nd Defendant. On the 18th of March 2021, the Claimant was granted permission to serve both Defendants by substituted service on Advantage General Insurance Company Limited. On the 11th of January 2022, judgment was entered in default of an acknowledgment of service. On the 6th of July 2022, an acknowledgment of service and defence were filed by the 1st Defendant.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[5] In written submissions filed on behalf of the Applicant, the Court was informed that the application was based solely on the provisions of **Rule 13.3** of the Civil Procedure Rule (CPR) which states:

1. *The Court may set aside or vary a default judgement 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 default 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 the judgement 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.*

[6] Ms. Thompson also referred to a number of authorities which examined the Court's power to set aside a default judgment. These authorities included **Evans v Bartlam** [1937] 2 All ER 646 and **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes** [2005] UKPC (25 July 2005) where Lord Millett at paragraph 21 stated that "*a default judgment is one which has not been decided on the merits*."

[7] In support of the request for an extension of time to file the ancillary claim, Learned Counsel made reference to **Rule 26.1 (c)** which permits the court to extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed. The decision of **Mervis Taylor v Owen Lowe and Constable O'Gilvie and The Attorney General of Jamaica CL 1995/T188** was commended to the Court with specific emphasis on paragraphs 21 and 22 of the decision where it was stated as follows:

> *[21] "The conclusion from all this then is that third party actions are sui generis in that they arise by virtue of statute and not the common law; the liability of the third party does not arise unless the defendant is found liable; the date of Judgment against the defendant is the date on which the defendant's claim for contribution from third parties arises and that is the date from which the limitation period begins to run of third parties. The limitation period for the purpose of third party actions does not run from the date on which the claimant's cause of action arose."*
>
> *[22] "It follows from what I have said that in this case time has not yet begun to run for the purposes of the third party claim because the Owen Lowe has not yet been held liable.*

[8] Counsel also made reference to the decision of **Nyron Wright v Ceon Collins and Ceon Collins v Nyron Wright and Ameco Caribbean Incorporated Ltd and Cable and Wireless Jamaica Ltd.** [2016] JMSC Civ 64 in which these principles were re-affirmed in terms of the extension of time for the filing of the ancillary claim. Counsel submitted that where the ancillary claim is one for indemnity and/or contribution, the cause of action does not arise until a judgment is entered against the defendant/ proposed ancillary claimant. It is not tied to the cause of action for the tort of negligence and is not subject to that limitation period. Counsel also urged the Court to find that it is still early in the proceedings and this order would not cause any prejudice to the parties neither would it affect the trial date as the matter is currently at Case Management Conference. Ms Thompson argued that the facts and issues in dispute are the very same, whether on the claim or on the ancillary claim and it would be the best use of the court's resources and time to have all the issues ventilated at one trial, instead of separately in the event that judgment is entered against the 1st Defendant.

[9] In terms of the request to have the Ancillary Defendant served by substituted service, Counsel relied on **Rule 5.14** which outlines the Court's power to order substituted service. The affidavit of Racquel Dunbar filed on the 16th of November, 2022 was highlighted specifically where she averred that there had been unsuccessful attempts to serve the Ancillary Defendant within the required time hence the request to have him served by registered post.

[10] In respect of the assertion that the Applicant has a real prospect of success, Counsel submitted that in keeping with the requirements of **Rule 13.3**, the Defendant's application is properly supported by affidavit evidence, per the Affidavit of Winston Baker filed on the 30th of November, 2022, where he averred that it was the Ancillary Defendant that drifted into the driver's lawful path and collided with him. Counsel contended that while the judge hearing the application is not to conduct a mini-trial, the applicant has provided sufficient details to satisfy the court that he has a good defence, thereby satisfying the relevant test.

[11] On the question of whether the delay was inordinate and defeats this Application, Counsel submitted that the Court must assess whether the Applicant delayed in bringing his application and has a good explanation as to why he failed to defend the claim in the first place. Reference was made to paragraphs 39 and 44 of **Rohan Smith v Elroy Hector Pessoa & Nickeisha Misty Samuels** [2014] JMCA App 25, where the Court emphasised that any delay on the part of the applicant is merely a factor to be borne in mind by the Court in taking its decision and a period of 4-5 months would not be inordinately long so as to act to defeat the application. The observations of Sykes J (as he then was) in the case of **Sasha Gaye Saunders v Michael Green and Ors. 2005HCV2868** were also highlighted with emphasis on his remark that "*the new rule no longer has the strict gate keeping provisions as the previous rule 13.3. The new rule in Jamaica has only one ground and that is whether there is a real prospect of successfully defending the claim*."

[12] Counsel argued that the Applicant, Winston Baker had offered an extensive explanation regarding the delay in filing an Acknowledgment of Service and Defence, and the delay in applying to set aside the Default Judgment. Ms Thompson submitted further that based on his evidence, any delay on the part of the Applicant was neither wilful nor excessive as he had not been personally served with the Claim Form and Particulars of Claim. Counsel asked the Court to accept that the Applicant first became aware of the matter in June 2022, when he was located and contacted by the Attorneys-at-Law retained by his insurers and could not have responded to the claim before then.

[13] On the issue of possible prejudice being occasioned to the Claimant, Counsel submitted that this has not been fully established but in any event, must be balanced against the prejudice to the Defendant if he is prevented from putting forward his case. Counsel argued that the inconvenience to the Claimant would not equate to prejudice and there is a proper basis for the Court's exercise of its discretionary power.

ISSUES

[14] In respect of this application, the Court is tasked with deciding the following issues:

1. Whether the Applicant has a real prospect of successfully defending the claim to justify the setting aside of the default judgment?

2. Whether the Applicant applied to the Court as soon as is reasonably practicable after finding out that judgment has been entered?

3. Whether the Applicant has given a good explanation for the failure to file an acknowledgement of service?

4. Whether the Applicant has established sufficient basis to justify an extension of time to file an ancillary claim and for substituted service?

THE LAW AND ANALYSIS

[15] **Rule 13.3** of the CPR grants the Court the power to set aside a default judgment. **Rule 13.3** states that:

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

[16] In the seminal case of **Evans v Bartlam** (supra), the general principle regarding the setting aside of default judgments was articulated by Lord Atkin. He stated that:

> "*The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.*"

[17] It has been established by several decisions from our Courts that for a Defendant to set aside a default judgment regularly entered, the principal consideration is whether he has a real prospect of successfully defending the claim. In **Merlene Murray-Brown v Dunstan Harper and Winsome Harper** [2010] JMCA App 1, Phillips JA opined:

> *"[23] Rule 13.3 of the CPR governs cases, as its sub-title suggests, where the court may set aside or vary default judgments. In September 2006, the rule was amended, and there are no longer cumulative provisions which would permit 'a knockout blow' if one of the criteria is not met.* ***The focus of the court now in the exercise of its discretion is to assess whether the applicant has a real prospect of successfully defending the claim, but the court must also consider the matters set out in 13.3 [2] [a] & [b] of the rules***." (My emphasis)

Whether the Applicant has a real prospect of successfully defending the claim to justify the setting aside of the default judgment?

[18] The first hurdle to clear is whether the defendant has a real prospect of successfully defending the claim which is the paramount consideration. In paragraph 66 of the Court of Appeal decision of **Denry Cummings v Heart Institute of the Caribbean Limited** [2017] JMCA Civ 34, McDonald Bishop JA emphasized that in determining whether to set aside the default judgment, the foremost consideration is the defendant's prospect of success.

[19] Thus, in determining whether there was a real prospect of success, the court must give consideration to the claim, the nature of the defence, issues of the case and

whether there is a good defence on the merits with a realistic prospect of success. R**ule 13.4** provides that the application must be supported by evidence on affidavit and the affidavit must exhibit a draft of the proposed defence.

[20] In the instant case, the Claimant averred that she was a passenger in motor vehicle licensed **2549 GU** when the 2nd Defendant negligently drove motor vehicle licensed **2189 GU** into their path and caused a collision. In his affidavit, Mr. Baker deponed that it was the driver of the other vehicle, Mr. Marvin Tummings who caused the accident as he crossed over into the 2nd Defendant's lawful lane. He further deponed that both vehicles were travelling in opposite directions and Mr. Foster tried to avoid the collision by swerving as far left as he could, but Marvin Tummings continued driving in his lane which resulted in both vehicles colliding. The draft Defence outlines the same information with some additional details. It is evident therefore that the thrust of the Applicant's defence is that Marvin Tummings, the driver of motor vehicle licensed **2189 GU,** was the sole cause of the accident.

[21] In the absence of any evidence produced by the Claimant, the 1st Defendant's affidavit stands unchallenged. It is nonetheless necessary to determine if it meets the relevant standard. On a careful review of its contents, I find that the Applicant's proposed defence cannot be described as a bare denial of the claim as it raises an absolute defence to the allegations of negligence which have been raised by the Claimant. I am satisfied that the defence raised presents more than a merely arguable case but can be appropriately described as raising a real prospect of the Defendant successfully defending this claim.

Whether the Applicant applied to the Court as soon as is reasonably practicable after finding out that judgment has been entered

[22] Although I have taken the view that the Defendant has satisfied the primary consideration to set aside the default judgment, I carefully analysed whether the same could be true in respect of the other criteria outlined in **rule 13.3 (2)** of the CPR.

[23] In the case of **Pacha Zona Libre v Sawalha, Mamdouh Saleh Abdul Jaber** [2014] JMSC Civ. 232, Batts J provided useful guidance on the importance of **rule 13.3(2)(a)** where he stated**:**

> **"***clearly if an application is not made as soon as is reasonably practicable or if the explanation is not good then the chances of a successful application reduces significantly."*

[24] A similar pronouncement had been made by Sykes J (as he then was) in the case of **Sasha-Gaye Saunders** (supra) that:

> *"If the application is quite late, then that would have a negative impact of successfully setting aside the judgment."*

[25] Paragraph 28 of **Flexnon Limited v Constantine Michell and Others** [2015] JMCA App 55, is equally instructive, as McDonald Bishop JA stated that:

> *"While it is accepted that the primary consideration is whether there is a real prospect of the defence succeeding, that is not the sole consideration and neither is it determinative of the question whether a default judgment should be set aside. The relevant conditions specified in rule 13.3(2) must be considered and such weight accorded to each as a judge would deem fit in the circumstances of each case, whilst bearing in mind the need to give effect to the overriding objective."*

[26] In addressing this issue, Ms. Thompson submitted that any delay on the part of the Applicant in setting aside the Default Judgment was neither wilful nor excessive given the fact that he became aware of the matter in June 2022, was served with Default Judgment in October 2022 and filed this application on the 16th of November 2022. In the circumstances, in the absence of any evidence to the contrary, I accept that the Applicant acted with promptitude in seeking to set aside the default judgment.

Whether there is a good reason for failure to file an acknowledgment of service or a defence

[27] It is not in dispute that the 1st Defendant had not been personally served with the claim form and particulars of claim. The Court has also accepted that he would not have been aware of the claim against him until he was advised by a representative of Dunbar & Co, the Attorneys-at-Law retained by his insurer. In these circumstances, the Court accepts that the 1st Defendant would not have been in a position to file an acknowledgment of service within the requisite period and his explanation is accepted as sufficient in the circumstances.

PREJUDICE

[28] While the question of possible prejudice being suffered by the Claimant would usually arise for the Court's consideration, in this situation there was no evidence advanced in support of same. While the Court accepts that the Claimant could conceivably be prejudiced by the loss of her default judgment, I am satisfied that the Defendant would face greater prejudice given the strength of his defence. Accordingly, I find that the defendant must be afforded an opportunity to be heard on its defence and any possible loss which may be occasioned to the Claimant could be appropriately addressed in costs.

ANCILLARY CLAIM

[29] Having failed to file the Ancillary Claim and Ancillary Particulars of Claim within the requisite timeframe, on the 16th of November 2022, the 1st Defendant filed an application for extension of time to file the Ancillary Claim and Ancillary Particulars of Claim supported by an Affidavit sworn to by Racquel Dunbar.

[30] **Rule 26.1(2) (c)** of the CPR provides: "(2) Except where these Rules provide otherwise, the Court may – (c) extend or shorten the time for compliance with any rule, practice direction, order or direction of the Court even if the application for an extension is made after the time for compliance has passed." In addition to the

rules, the authorities cited by Learned Counsel were also taken into consideration for this application.

[31] The timeline makes it clear that the application has come at a very late stage in the proceedings, but the Court takes note of the explanation which has been offered for the delay which is the inability to locate the Ancillary Defendant in order to effect service on him. The Court acknowledges that there would have been a challenge to the Ancillary Claimant in terms of serving same within the required time given the challenges outlined. I accept that the Applicant was not sitting idly by while the time elapsed as the Affidavits of Racquel Dunbar and Winston Baker detail the efforts made to effect service of the documents on the Ancillary Defendant. Accordingly, I am prepared to enlarge/extend the time within which this Application can be made.

Substituted Service

[32] The Applicant is also seeking permission for substituted service to be effected on the Ancillary Defendant by registered mail to his last known address. On the issue of substituted service, **rules 5.13 and 5.14** of the CPR permit service to be effected by an alternate method of service. The Court has already acknowledged that there have been unsuccessful attempts and/or efforts to serve the Ancillary Defendant within the required time period. The challenge which must be addressed however is there is no evidence before the Court to support the Applicant's assertion that the proposed address is in fact Mr. Tummings registered address, whether last known or otherwise. As a result of this situation, the Court is unable to grant this specific order.

CONCLUSION

[33] In light of the foregoing findings, the Court makes the following orders:

1. The Application to set aside default judgment is granted.

2. Marvin Tummings is to be joined as an Ancillary Defendant.

3. The Ancillary Claim Form, Ancillary Particulars of Claim and any other relevant document is to be served on Marvin Tummings.

4. Costs are awarded to the claimant/respondent to be taxed if not agreed.

5. Applicant's Attorney to prepare, file and serve the Formal Order herein.