



[2018] JMSC Civ 46

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 01922

BETWEEN	V.I.P HOME FOR THE AGED LTD.	CLAIMANT
AND	MAXINE PRYCE	DEFENDANT

IN CHAMBERS

Lijyasu Kandekore, of counsel, for the Claimant

Mrs Yualande Christopher-Walker, instructed by Yualande Christopher & Associates for the Respondent/Defendant

HEARD: March 14 & 15, 2018

JUDGMENT ENTERED IN DEFAULT OF ACKNOWLEDGEMENT OF SERVICE – APPLICATION TO SET ASIDE DEFAULT JUDGMENT – WHETHER APPLICATION TO SET ASIDE DEFAULT JUDGMENT WAS FILED AS SOON AS WAS REASONABLY PRACTICABLE – FAILURE OF DEFENDANT TO CHALLENGE EX PARTE ORDER FOR SERVICE OUT OF THE JURISDICTION – MERE EXHIBITING OF DRAFT DEFENCE AND REFERENCE TO THE CONTENTS THEREOF BY AN ATTORNEY, IS INADEQUATE – DISPUTED FACTS

ANDERSON K., J

[1] The defendant has applied for an order of this court, to set aside the Judgment in Default of Acknowledgment of Service, which was entered against her, by a Registrar of this court, on September 11, 2015

[2] Said application was filed on February 26, 2018, by which time, the said judgment had been registered in England, also.

[3] Rule 13.3 of the Civil Procedure Rules (hereinafter referred to as, 'the CPR') read along with **Part 12 of the CPR**, applies to applications to set aside default judgment. **Rule 13.3 (1) and (2) of the CPR**, specify as follows:

'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.'

[4] The grounds of the application, are as follows:

- a) The orders are sought pursuant to **Rule 13.3 (1) and (2) and 13.4 of the CPR (Amended)**.
- b) The defendant has applied to this court as soon as is reasonably practicable in the circumstances;
- c) The defendant has a very good explanation for her failure to file an Acknowledgement of Service of claim as she never received the claim, nor was notice of it ever given to her until recently in December 2017.
- d) The defendant has a reasonable prospect of succeeding at the trial of this claim.
- e) The orders sought above are necessary for the just, fair and effective disposal of these proceedings, and for the furtherance of the overriding objective.

[5] Evidence on behalf of the defendant led in support of her application, was provided to this court by her attorney – Mrs. Walker. Mrs. Walker has deponed to the alleged fact that notice of the existence of this claim first came to the applicant's attention, in or about, December of 2017.

[6] Mrs. Walker has also given evidence that the law firm in which she is a principal – Yualande Christopher and Associates, was retained in relation to a dispute between the parties to this claim from the early part of 2014. That dispute

though, was not then, as regards this claim, but instead, in relation, to the issue of the defendant's mother's body's whereabouts, after the defendant's mother's death, having been unable to be found by the defendant, even though the defendant's mother had passed away, while residing at the claimant's home for elderly persons. At that time, the defendant's mother was residing there, on a commercial basis, in other words, based upon a monthly fee to be paid, plus the payment of other expenses, such as, for instance, medication. Evidence given by the claimant, in response to the defendant's application, makes that clear.

- [7] There is though, now existing, a dispute between the parties, as to whether or not there existed any contract between the parties, as distinct from a contract between the claimant and the defendant's mother up until the time of the latter's passing, in respect of which, the defendant, has contended, in support of her present application by means of the evidence given on her behalf by Mrs. Walker, that she was not privy to and therefore, cannot be held liable for any breach of.
- [8] The claimant obtained an order for his claim and supporting documentation to be served on the defendant at an address in England, which the defendant did not reside at, between February 2014 and December 2016, during which time, the claim form was purportedly delivered to that address. The defendant not only did not reside at that address during that time period, but also had tenants occupying there at that time and in addition, although she (the defendant) visited the United Kingdom on three (3) occasions between 2016 and 2017, it is the evidence of Mrs. Walker, as given on the defendant's behalf, that the defendant did not go to that address, on any of those occasions, during that time period.
- [9] The order for service of the claim form and supporting documents on the defendant at that address was made by this court, following on an ex parte application – as the rules of court permit. That order was granted by Master Bertram-Linton (Ag.) (as she then was), on July 2, 2014.

- [10] Whether or not the court was misled into having made that order, as a consequence of outright deception on the part of the claimant, since it is the defendant's allegation that at all material times, the claimant knew that the defendant did not in fact reside at the address of: 105 Clifford Gardens, is irrelevant at this stage, bearing in mind that this court did in fact make that order and that order was never directly challenged by the defendant, as it could have been, bearing in mind that the said order was granted *ex parte*. **Rule 11.16 of the CPR**, permits such a challenge to have been made. If even an extension of time had been needed for the purpose of making that application, our rules of court permit this court to grant such an extension of time. See: **rule 26.1 (2) (c) of the CPR** in that regard.
- [11] What is of importance for present purposes, is firstly, whether the defendant applied to this court, to set aside the default judgment, as soon as was reasonably practicable after having found out that default judgment had been entered against her.
- [12] In that regard, in the particular context of this particular claim, it is clear that based on the evidence adduced on the defendant's behalf, it took at least two (2) months, or perhaps a few days less than two (2) months, for the defendant's application to set aside the default judgment to have been filed, following upon the defendant having become aware of the default judgment which had been entered against her, sometime in December of 2017. To my mind, when considered in that particular context, that period of time for the filing of this application which is now under this court's consideration, seems to be unduly lengthy and not, within a reasonably practicable time period. The defendant's evidence, to my mind falls short of satisfying this court that the defendant has applied to set aside the default judgment that was entered against her, as soon as was 'reasonably practicable' after having found out that default judgment had been entered against her.

- [13] To my mind, the defendant has given a good explanation for her failure to have filed an Acknowledgement of Service within time and that is that, she was not aware of the existence of this claim, until after a default judgment had been entered against her. That though, is not the end of the matter, as the issue as to whether the defendant's said application was so filed within that 'reasonably practicable' time period and the other issue, as to whether the defendant has given a good explanation for her failure to have filed her Acknowledgement of Service within time, although of importance, are not the pre-eminent considerations of this court, for present purposes. What is the pre-eminent consideration is whether or not the defendant's proposed defence, is one which has a realistic prospect of success. See: **Nadine Billone and Experts 2010 Company Ltd.** – 2013 JMSC Civ 150; **Marcia Jarrett and South East Regional Health Authority, Robert Wan and The Attorney General** – Claim No. 2006 HCV 00816.
- [14] What then, is the defendant's proposed defence? Her attorney, Mrs. Walker has deponed to same, by referring to the applicant's draft defence which has been attached as an exhibit to Mrs. Walker's affidavit. That draft defence is unsigned by anyone and there is no indication anywhere in Mrs. Walker's affidavit that she has personal knowledge of whether or not the parties had ever entered into a contractual relationship as regards the claimant's care for and housing of the defendant's mother, while she was still alive.
- [15] Paragraphs 18-21 of Mrs. Walker's affidavit therefore speak to that defence, presumably based on second-hand information. Surprisingly and interestingly also, is the fact that as far as I have been able to discern, nowhere in Mrs. Walker's affidavit, has any evidence been provided to this court by Mrs. Walker, as to the source of the hearsay information which has been set out throughout Mrs. Walker's affidavit. It does appear though, from the wording of paragraph 18 of Mrs. Walker's affidavit, that her knowledge of that which she has deponed to,

in paragraphs 18-21 of her affidavit, have been derived from the draft defence which has been exhibited to that affidavit of hers.

- [16] The mere exhibiting of a draft defence and reference to the contents of same in an affidavit, is not, to my mind, equivalent to providing this court with adequate evidence, proving that the said proposed defence, is one which has a realistic prospect of success. In that regard, see the following cases: **Georgette Smith and Jamaica Defence Force Co-operative Credit Union** [2018] JMSC Civ 29, especially at paragraphs 49-58, per Anderson J., **B & J Equipment Rental Ltd. v Joseph Nance** – [2013] JMCA Civ. 2 and **Kimaley Prince v Gibson Trading and Automotive Ltd. (GTA)** – [2016] JMSC Civ 147, per McDonald, J.
- [17] In any event though, the defendant's proposed defence is cast in grave doubt, bearing in mind that electronic mail messages which were exhibited to an affidavit which was deponed to, by Mr. Kandekore, in response to the defendant's application to set aside the default judgment which has been entered against her. That electronic mail evidence although filed and served very 'late in the day,' is not only undisputed, but Mrs. Walker never sought any opportunity to dispute same, by means of an adjournment, to give her time to so do. In other words, when this matter came before this court for hearing, when I was then presiding, Mrs. Walker never sought to have this matter adjourned before it was commenced.
- [18] In the final analysis for present purposes therefore, it is this court's conclusion that the defendant has wholly failed to satisfy this court, that her defence is one which has any realistic prospect of success.
- [19] As such, the defendant's application to set aside the default judgment which has been entered against her, must and will be, denied.

Orders

1. The defendant's application to set aside the default judgment which has been entered against her, is denied.
2. The costs of that application are awarded to the claimant, with such costs to be taxed, if not sooner agreed.
3. Leave to appeal is granted.
4. The claimant shall file and serve this order.

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Hon. K. Anderson, J.