[2020] JMSC Civ 84

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016HCV02956

BETWEEN	**KERRY ANN WHITE**	**CLAIMANT**
AND	**ST. OSBOURNE WRIGHT**	**1ST DEFENDANT**
	STEPHEN BLAKE	**2ND DEFENDANT**

IN CHAMBERS

Miss Gillian Burgess Attorney-at-Law for the 2nd Defendant/Applicant

Mr. Jovelle Barrett instructed by Nigel Jones & Company for the Claimant/Respondent

Heard: July 24 and October 16, 2019, March 5, 2020

Rule 13.3 of the Civil Procedure Rule as amended (2006) – Application to set aside Default Judgment – Whether the 2nd Defendant has a real prospect of defending the case – Delay in making the application –whether there is a good reason for failing to file an Acknowledgment of Service

MASTER MASON

Background

[1] The Applicant and 2nd Defendant Stephen Blake has filed a Notice of Application on January 8, 2019 to set aside a judgment regularly obtained by the Claimant on May 24, 2017 in default of Acknowledgment of Service. The Claimant, Kerry-Ann White is suing the 2nd Defendant to recover damages for negligence and or

breach of statutory duty that while she was a passenger in a 2008 Toyota Coaster motor vehicle with registration PC 8906 travelling from Kingston to Cornwall Beach in Montego Bay, St. James, the 2nd Defendant negligently swerved and lost control of the said motor vehicle causing it to overturn resulting in the Claimant sustaining injuries and incurring costs.

The Law

[2] Now, the Court in analysing the basis for setting aside a default judgment regularly obtained must examine rule 13.3 which states 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 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.*

[3] As highlighted by McDonald-Bishop J (as she then was) at paragraph (63) in the case of **Joseph Nanco v Anthony Lugg and B&J Equipment Rental Limited** [2012] JMSC Civ 81, she said:

> *"By now, it is well established that the primary test for setting aside a default judgment regularly obtained is that the Defendant must have a real prospect of successfully defending the claim rather than a fanciful one:* ***Swain v Hillman and Another*** *[2001]1 All ER 91."*

[4] McDonald-Bishop J went on to highlight the requisite consideration that must be borne in mind in evaluating whether the test has been satisfied at paragraph 64 where it was opined that:

> *"In evaluating whether the test has been satisfied there must be shown a defence on the merits to that requisite standard. In* ***Furnival v Brooke*** *[1883] it was said (and I take it as being applicable today) that where the*

> *judgment is regular the Court has a discretion in the matter and the Defendant, as a rule, must show by affidavit that he has a defence to the action on the merits. Stuart Sime, in his text, A Practical Approach to Civil Procedure 6th Edition, p 248; noted that the written evidence in support of the application to set aside will have to address, in particular, the alleged defence on the merit, the reason for not responding to the claim in time, and the explanation for any delay in making the application to set aside. This, of course, is in keeping with the prerequisites that must be satisfied pursuant to the rules."*

[5] Furthermore, according to Craig Osbourn Civil Litigation Practice Guides 2005-2006, page 364, the Defendant must file evidence to persuade the court that there are serious issues which provide a real prospect of him successfully defending the claim. The evidence filed must set out the case in sufficient detail to satisfy the test. The law is clear, the Affidavit must contain the facts being relied on and the draft Defence should be exhibited.

[6] In the case of **Evans v Bartlam** [1973] A.C 473 it was said that before a judgment regularly obtained could be set aside, it ought not to be granted except for sufficient cause shown. The authorities mentioned in paragraphs 10-12 (inclusive) demonstrate that there must be an Affidavit of Merit and a Defence which provide the Court with sufficient evidence to persuade it that there is a real prospect of the Defendant successfully defending the claim.

[7] However, in exercising the discretion whether or not to set aside a Judgment regularly obtained, the Court must also examine the matters set out in rule 13.3(2) of the Civil Procedure Rule (CPR).

Is there a defence with a real prospect of success?

[8] In analysing the case at bar, it is necessary to examine the Affidavit evidence and the proposed Defence filed by the 2nd Defendant in order to determine whether there is any evidence of merit to satisfy the test as to whether the 2nd Defendant has a real prospect of successfully defending the claim

[9] The 2nd Defendant puts forward his explanation for the cause of the accident and his defence at paragraph 2 of his Affidavit in Support of Application for Court

Orders to Set Aside Default Judgment filed on January 8, 2019 and at paragraph 4 of his proposed Defence as follows:

> *"Upon reaching the vicinity of the Duncans area a motor vehicle overtook the bus and cut in front of the bus and was so close to the front of the bus that if I did not swerve the bus would have made contact with the vehicle. Upon swerving, I lost control of the vehicle. After the accident, the vehicle was inspected and a number of photographs were taken, it was discovered that the control arm was broken. I am advised and do verily believe that the broken control arm caused or significantly contributed to the accident."*

[10] The 2nd Defendant further contends in his Defence and Affidavit that he was not speeding, he denies that it was negligent to swerve in order to avoid a collision. Based on the foregoing, the 2nd Defendant maintains that he has a realistic prospect of defending the claim.

[11] The Claimant, however, vigorously rejects the position taken by the 2nd Defendant and submits that the 2nd Defendant who transports persons for hire would have been able to detect certain obvious symptoms like clunking noises and steering wheel issues if the control arm was broken or worn. The Claimant further submits and relies upon advice he received and verily believes from a Mr Roberto Pizza, CEO of Continental Garage Limited who has some 30 years experience and, as indicated at paragraph 6 of Affidavit of Olesya Y Ammar in opposition to the application to Set Aside Default Judgment Judgment filed on October 14, 2019 states that any experienced driver would be aware of such a defect , and further, if the 2nd Defendant drove the vehicle within the speed limit, the extent of the damage to the vehicle and injuries to the passengers would not have been so severe.

[12] I am of the view that the 2nd Defendant has failed to provide an arguable evidence to the court that indicates he has a reasonable prospect of success, should this matter go to trial.

[13] It is known that an Affidavit of Merit is usually required in these circumstance, that is, an application to set aside default judgment regularly entered, and it is

usually made by one who can speak positively to the facts. However, it has been established in a long line of cases that in interlocutory proceedings, such as this application is, an Affidavit of Merit may contain information from sources so disclosed once the paragraphs adequately identify the source of the information and belief was enunciated in the principle Trinidad and Tobago case of **Water and Sewage Authority v Waite** [1972] 21 W.I.R. 498 that since proceedings to set aside a default judgment was interlocutory, the affidavit of merit could contain statement of information and belief with the sources and grounds thereof.

[14] In that regard, I am of the view that it puts to rest any challenge by the 2nd Defendant to the Affidavit of Miss Ammar, legal intern who introduce the results of her searches and enquiries from a third party. It is therefore an Affidavit of Merit as it complies with rule 30.3(1) and (2) of the CPR

[15] Further, I find that the 2nd Defendant's defence contain mere denials of the crucial issues and whereby he contends that he was not responsible for the accident and hereby puts the Claimant to strict proof of the injuries she received as a result of the accident. I am of the view that the defence is weak and is without any merit. Consequently, there is no prospect of success as the 2nd Defendant fails to provide any factual assertions to contradict the Claimant's statement of case.

[16] Although the primary consideration in an application to set aside a default judgment is whether the defence has any real prospect of success, it is accepted that rule 13.3(2) must be considered.

[17] Phillips JA in the case of **Merlene-Murray Brown v Dunstan Harper and Winsome Harper** [2010] JMCA Appl had this to say:

> *"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) and (b) of the rules."*

Whether the application was made promptly

[18] An application to set aside a default judgment was filed on January 8, 2019 by the 2nd Defendant after he was served with a Notice of Adjourned Hearing on June 8, 2018. It is evident that the 2nd Defendant did not act promptly. In the case of **Victor Gayle v Jamaica Citrus Growers and Anthony McCarty** unreported Claim No. 2008HCV05707 it was held by Edwards J (Ag) (as she then was) that a delay of 6 months was inordinate.

Reason for failure to file an Acknowledgment of Service and a Defence

[19] The 2nd Defendant was served personally with the Claim Form and Particulars of Claim on November 8, 2016. At paragraph 6 of his Affidavit in Support of Notice of Application to Set Aside Default Judgment he states as follows:

> *"I was served with the Claim Form and Particulars of Claim. I did not take them to a lawyer. I did not understand the papers. I felt overwhelmed by the number of documents."*

[20] To my mind, this is not a good explanation for not filing an Acknowledgment of Service or a Defence in the prescribed time. In fact, it is a poor excuse. However, the absence of a good explanation does not in itself dispose of a matter. In **Thornpic v McDonald** [1999] PPLR, 660 the UK Court of Appeal stated that any failure by the Defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside.

[21] The court takes into consideration the overriding objective as set out in the CPR Rule 1.1(2) where it speaks to dealing with cases justly. Since the 2nd Defendant has failed to satisfy the requisite considerations as outline in rule 13.3(1) (2)(a) and (b) of the CPR in applying to Set Aside a Default Judgment. It is therefore just and fair that this matter should proceed to be determined without any further delay.

[22] Accordingly, I make the following orders:

(1) Default Judgment entered in favour of the Claimant against the 2nd Defendant stands;

(2) The parties are to proceed to Assessment of Damages which is fixed for July 8, 2021 at 10:00a.m;

(3) Costs to the Claimant to be agreed or taxed;

(4) The Claimant's Attorney-at-Law to prepare, file and serve this Order.