[2018] JMSC Civ 185

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014HCV05930

BETWEEN	**ASTON WHITTAKER**	**CLAIMANT**
AND	**CALVIN JUNIOR CAMPBELL**	**1ST DEFENDANT**
AND	**DENO JONES**	**2ND DEFENDANT**

IN CHAMBERS

Miss Carleen McFarlane instructed by McNeil & McFarlane for the Claimant

Miss Annaliesa Lindsay instructed by John G. Graham & Company for the 2nd Defendant

Heard on May 31 and December 6, 2018

APPLICATION TO SET ASIDE DEFAULT JUDGMENT – CPR Rule 13.3

MASTER MASON

[1] Mr. Deno Jones, the Applicant/2nd Defendant in this matter is seeking an order by way of a Notice of Application for Court Orders filed on August 29, 2017 to set aside the judgment in default entered against him on June 22, 2016 and for permission to be granted to him to file his defence out of time. The grounds on which the Applicant/2nd Defendant is seeking the said Orders are as follows:

(a) The 2nd defendant did not become aware of the judgment until July 18, 2017 when John G. Graham & Company were erroneously served with the judgment against the 2nd defendant and Notice of Assessment of Damages on July 7, 2017.

(b) The 2nd defendant made this application as soon as was reasonably possible after finding out that judgment had been entered against him.

(c) The 2nd defendant's failure to file his defence in time was not deliberate.

(d) That the 2nd defendant has a real prospect of successfully defending the claim.

(e) There would be no undue prejudice to the claimant if the 2nd defendant were allowed to file his defence out of time, as the date scheduled for the Assessment of Damages was in February. 2018.

Background

[2] On or about January 16, 2009, the claimant a pedestrian while travelling on the Runaway Bay main road in the parish of St. Ann, was struck by a car allegedly driven negligently by the 2nd defendant and owned by the 1st defendant and registered 8865 EQ. As a result of the collision, the claimant suffered injuries, loss, damage and incurred expenses. A Claim Form and Particulars of Claim was filed on December 3, 2014 and served on both defendants. The 2nd defendant failed to acknowledge service or file a defence within the prescribed time as a result, default judgement was entered against the 2nd defendant in accordance with Part 12 of the Civil Procedure Rules 2002 as amended (2006). The 2nd defendant disputes that he was personally served and has applied to set aside the default judgment arguing, inter alia, that he has a real prospect of successfully defending the claim.

Chronology of Events

[3] 1. January 16, 2009 – the incident occurred on the Runaway Bay main road, St. Ann.

2. December 3, 2014 – the Claimant filed a Claim Form and Particulars of Claim and all relevant documents. A Notice of Proceedings is served on Advantage General Insurance Company Limited in Kingston, the insurers of the 1st defendant and owners of vehicle registered 8865 EQ.

3. May 22nd 2015 – the Claimant files an Ex Parte Notice of Application for Substituted Service and Supporting Affidavit.

4. June 4, 2015 – Letter from John G. Graham and Company to the Claimant's attorney-at-law requesting a copy of the Formal Order permitting Substituted Service.

5. June 22, 2016 – The Claimant requests and is granted default judgment against the 2nd defendant for failing to file an acknowledgment of service or a defence.

6. July 18, 2016 – Order made by Master Jackson-Haisley as she then was dispensing with personal service of claim form.

7. July 22, 2016 – Order filed and perfected confirming alternative method of service on the 2nd defendant pursuant to Rule 5.13 of CPR is satisfactory.

8. August 29, 2017 – The 2nd defendant filed an application and supporting affidavit to set aside default judgment along with a Defence.

Legal Issues

[4] 1. Whether the 2nd defendant was properly served with all the relevant court documents?

2. Whether the 2nd defendant has a real prospect of setting aside the default judgment pursuant to rule 13.3 of the CPR?

Issue #1

Was the 2nd defendant properly served with the Claim Form and Particulars of Claim?

Rule 5.1(1) of the CPR states as follows:

> *"The general rule is that Claim Form must be served personally on each defendant."*

However, there are instances in which for one reason or another, it is not possible to serve a defendant personally. In such matters, an alternative method of service is used. Consequently, in the instant case, an application was made pursuant to Section 5.13 of the CPR which provides as follows:

5.13(1) Instead of personal service a party may choose an alternative method of service.

(2) Where a party

(a) chooses an alternative method of service; and

(b) the court is asked to take any step on the basis that the claim form has been served,

The party who served the claim form must file evidence on affidavit proving that the method of service was sufficient to enable the Defendant to ascertain the contents of the claim form.

(3) An Affidavit under paragraph (2) must –

(a) Give details of the method of service used;

(b) Show that -

(i) the person intended to be served was able to ascertain the contents of the documents;

(ii) it is likely that he or she would have been able to do so;

(c) State the time when the person served was likely to have been in a position to ascertain the contents of the documents; and

(d) Exhibit a copy of the documents served.

(4) The registry must immediately refer any affidavit filed under paragraph (2) to a judge, master or registrar who must –

(a) Consider the evidence; and

(b) Endorse on the Affidavit whether it satisfactorily proves service.

(6) Where the Court is not satisfied that .....

(7) An endorsement made pursuant to 5.13(4) may be set aside on good cause being shown:

[5] On May 22, 2015, the claimant filed an Exparte Notice of Application and Supporting Affidavit for Substituted Service. On July 18, 2016 Master Jackson Haisley granted the order which reads:

> *"In accordance with Rule 5.(13) of the Civil Procedure Rules (2002) and having considered the evidence of Carleen McFarlane contained in this affidavit the court finds that it satisfactorily proves service on the 2nd defendant."*

[6] According to affidavit of service by registered post of Denton Simpson filed on August 17, 2017 a copy of the order dated July 18, 2016 was sent by registered post on July 21, 2017 to the 2nd defendant at his address 151 Torado Drive, Coral Gardens, Montego Bay, St. James. His uncle Michael Jones was served at J&J Pharmacy Ltd., 82 Barnett Street, Montego Bay P.O., St. James. The 2nd defendant's attorney-at-law Messer John G. Graham and Company were also

served with a copy of the order on July 7, 2017 pursuant to paragraph 3 of an affidavit of the 2nd defendant, he was advised by Miss Karlene Pinnock of John G. Graham & Company.

[7] The affidavit evidence of the process server Miss Audrey Oates, Bailiff attached to the Montego Bay Resident Magistrate's Court confirms that the claimant followed the procedure set out in rule 5.13 of the CPR. She depones in her affidavit filed on March 24, 2016, that she attempted on (3) separate occasions to effect personal service of the claim form and particulars of claim on the 2nd Defendant at his address at 151 Torrado Drive, Coral Gardens, Montego Bay, St. James but was unable to do so. She then gave the documents to Mr. Michael Jones, the uncle of the 2nd defendant. Four (4) days later, the Process Server called Mr. Jones who confirmed that he gave the documents to the 2nd defendant.

[8] Pursuant to the evidence contained in affidavit of Ms Carleen McFarlane filed on March 24, 2016 the 2nd Defendant received the documents. At paragraph 7 she states that the 2nd defendant called her on June 4, 2015 to say that he had received the documents and that he was being accused of being liable in respect of an accident in January 2006 and it was the Claimant who was wrong. At paragraph 9, Ms McFarlane states further that the 2nd defendant called her office a second time to explain that he had not taken any steps as he was certain that he was not at fault.

[9] According to Rule 5.13(6) of the CPR, the only way the Order made by Master Jackson Haisley on July 18, 2016 could be set aside was if the 2nd defendant showed good cause for so doing. At paragraph 4 of his affidavit filed on August 29, 2017 he states that he had moved from Montego Bay to Kingston in 2004, married in 2010 and since then, his visits to his parents are not regular. To my mind, this is not a good reason to set aside the order. In any event, the 2nd defendant was aware of the documents and was able to consult an attorney-at-law on the matter, he has suffered no prejudice whatsoever.

[10] Furthermore, given the fact that he is contesting the evidence of Ms Audrey Oates, the 2nd defendant could have availed himself by filing an application to challenge the court's jurisdiction pursuant to rule 9.6 of the CPR, but unfortunately, time is no longer in his favour.

[11] I am satisfied therefore, based on the foregoing discussion that the 2nd defendant was properly served with the relevant court document. There is no irregularity of service to warrant setting aside of the default judgment that was regularly entered.

Issue #2

Whether the 2nd defendant has a real prospect of setting aside the default judgment pursuant to rule 13.3 of the CPR?

[12] In going forward, I am of the view that the judgment entered is a regularly obtained Judgment in Default of Acknowledgment of Service. The 2nd defendant has filed an application on August 29, 2017 to set aside this judgment.

The Law

[13] In order to examine that position one has to look at the power of the Court to set aside a default judgment regularly obtained pursuant to Part 13 of the CPR, rule 13.3 of that rule states:

> (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 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.

[14] It is well established in case law that the primary consideration for setting aside a default judgment regularly obtained is whether the Defendant has a real prospect of successfully defending the claim as opposed to a fanciful prospect of success. According to Sykes, J at paragraph 22 of his Judgment of **Sasha Gaye Saunders v Michael Green et al**, Claim 2005HCV02868, "the test of a real prospect of successfully defending the Claim is much higher than the test of an arguable defence."

Sykes J endorsed the Judgment of **ED&F Man Liquid Products v Patel & Anor** [2003] C.P.R ep 51 which states that – "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 assertions and the Judge must accept it. This was enunciated by Lord Justice Potter at paragraph 10 in **ED&F Man Liquid Products.**

> *"However, that does not mean that the Court has to accept without analysis everything said by a party in his statements before the Court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable...."*

[15] It is submitted therefore, that in evaluating whether the test has been satisfied, there must be affidavit evidence of merit and a defence which meets the requirements of part 10 of the CPR. The draft defence must reflect the factual evidence on which the Defendant is seeking to rely.

[16] According to Craig Osbourn, (**Civil Litigation, Legal Practice Course Guides 2005-2006 p. 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.

[17] The law is clear that the Affidavit must contain the facts being relied on and that the draft Defence should be exhibited. In **Evans v Bartlam** [1937] AC 473, it was said that before a Judgment regularly obtained could be set aside, an Affidavit of Merit was required and when the application is not so supported, it ought not to be granted except for some sufficient cause shown.

[18] It is noted that the aforementioned authorities demonstrate that there must be an affidavit of merit and a defence which provide the court with sufficient evidence to persuade that there is a real prospect of a defendant successfully defending the claim. In exercising the discretion, the court must also consider the requirements set out in rule 13.3(2)

Real Prospect of Defending the Claim

[19] The claim in this matter stems from a collision between the vehicle driven by the 2nd defendant and owned by the 1st defendant and the claimant, a pedestrian. The collision is not disputed. The claimant alleges that the collision occurred as a result of the negligent driving of the 2nd defendant. The 1st defendant in his affidavit totally denies that the claimant was injured as a result of his negligence. The burden rest on the 2nd defendant to satisfy the court that a defence with a real prospect of success has been put forward.

[20] In **Victor Gayle v Jamaica Citrus Growers & Anthony McCarthy,** claim 2008HCV05707, Edwards J outlined at paragraph 8 that it is generally accepted that the real prospect of success test is the same as the test applicable to summary judgment. Consequently, Edwards J in paragraph 30 outlined the following test:

In Blackstone's Civil Procedure 2004 paragraph 34.13 the learned editors in reference to summary judgment applications argued that a defendant could seek to show a defence with a real prospect of success by setting arguments involving:

> *(a) A substantive defence eg. Violent non injuria, frustration, illegality etc;*
>
> (b) A point of view destroying the claimant's cause of action;
>
> (c) A denial of facts supporting the claimant's cause of action eg., an exclusion clause, or that the defendant was an agent rather than a principal.

[21] Therefore, a good defence may be one of law or fact alone, or a mixture of facts and law. A weak or fanciful defence is where it is without substance and is contradicted by documentary evidence or any other material on which it is based. There is also very little prospect of success if the defence consists purely of bare denials and or admissions.

[22] In the instant case, the 2nd defendant's proposed defence is riddled with denials. The 2nd defendant claims that he was in a line of traffic when the claimant suddenly jumped into the roadway and in his path causing the motor vehicle to collide with him. The 2nd defendant in his affidavit is also claiming that the claimant was drunk when the accident occurred. There is nothing to substantiate this position taken by the 2nd defendant.

[23] The 2nd defendant in his defence does not admit the particulars of injuries, treatment and particulars of disability outlined in the particulars of claim. He also rejects the medical report of Dr. Denton Barnes to be admitted. In my opinion, it seems unlikely that such a defence has a real prospect of success.

[24] I do not accept the 2nd defendant's position that he was in a line of traffic within the speed limit when the collision occurred. The court will consider the fact that it would be unlikely for a man of sound man to suddenly jump into harm's way for

no apparent reason. It is necessary to consider the evidence contained in the police report about the accident. The report does not state which party was at fault but it clearly states that the claimant was injured by the 2nd defendant's vehicle and that the 2nd defendant was warned for prosecution. The report is not conclusive, but it does, weaken the proposed defence of the 2nd defendant to the extent that the 2nd defendant is claiming that he was not at fault and that the accident was caused as a result of the claimant's negligence.

[25] Therefore, having examined the aforementioned evidence, I am of the view that evidence contained in the 2nd defendant's affidavit and proposed defence is not compelling and is devoid of merit. The 2nd defendant is merely putting forward an arguable defence and as such, he failed to satisfy me that he has a real prospect of successfully defending the claim.

Whether the Application was made promptly

[26] The Default Judgment was entered against the 2nd Defendant on June 22, 2016. The Application to set aside the default judgment was filed on August 29, 2017. The 2nd Defendant asserts that he was not aware of the Judgment until July 18, 2017 when John G. Graham & Company was erroneously served with the, Order, copy of default judgment and Notice of Assessment of Damages.

[27] In the case of **Nadine Billone v Experts 2010 Company Ltd.** [2013] JMSC Civ 150, where the application to set aside default judgment was made about 20 days after the default judgment was entered, Anderson J was of the view that the defendant failed to provide any reason to explain why it was not reasonably practicable for the application to have been made earlier. In the instant case the 2nd defendant offers no reason for the delay. The 2nd defendant was encouraged to visit the insurers for the motor vehicle but he refused to do so. I am of the view that the 2nd defendant failed to provide reasons for the late application to set aside the default judgment.

Reasons for failing to acknowledge service and to file a Defence

[28] The 2nd Defendant has no good reason for failing to file an Acknowledgment of Service and a Defence. Had the 2nd Defendant acknowledged receipt of the Court documents in June 2015 and read them, he would have known that a responsibility is attached to receiving the documents. At paragraphs 5 and 6 of his affidavit he states that he sought advice from John G. Graham & Company when he became aware of the claim sometime in 2014.

[29] However, he does not clearly state why he failed to retain them. The 2nd defendant did not make an effort to seek alternative legal assistance, for example the Legal Aid Clinic instead, he refused to take any steps to resolve the matter.

[30] In the **Sasha Gaye Saunders** case Sykes, J at paragraph 10 outlined that it is the litigant who is sued, hence they have the responsibility to ensure that court procedures are followed. The documents that accompany the claim form and particulars of claim are in the plainest language. It clearly outlines the consequences of failing to file an acknowledgment of service or a defence. There is no evidence that the 2nd defendant is illiterate or has any comprehension difficulties. The 2nd defendant's tardiness and inaction in this matter is inexcusable.

Prejudice

[31] The issue of prejudice was not revisited by either party, however, I am of the view that the claimant would be prejudiced if the default judgment is set aside. He would suffer financial loss and would be subjected to a long wait in procuring a trial date.

[32] According to Moore-Bick J in **International Finance Corporation v Utexara** [2001] CLC 1361

> *"A person who holds a regular Judgment, even a Default Judgment, has something of value and in order to avoid injustice he should not be*

> *deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice to set the Judgment aside."*

[33] This is particularly so when Counsel is tardy in meeting the requisite deadlines as set out in the rules. It is the duty of the court to ensure that deadlines are obeyed. The rules must be interpreted and applied in order to give effect to the overriding objective which involves ensuring that as far as practicable cases are dealt with expeditiously and fairly.

[34] I therefore find that the 2nd defendant has no real prospect of successfully defending the claim.

I order accordingly

1. The application to Set Aside Default Judgment entered against the 2nd defendant on June 22, 2016 is refused.

2. Permission for the 2nd defendant to file his defence out of time is refused.

3. Costs to the Claimant to be agreed or taxed.

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

5. Leave to appeal is refused.