[2019] JMSC Civ 170

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2013 HCV 00865**

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| **BETWEEN** | **DONNADEEN WILLIAMS** | **CLAIMANT** |
| **AND** | **JON DEN & XIN PENG GE** | **DEFENDANT** |

**IN CHAMBERS**

Giovanni Gardner for the Applicant/Intervener

Dameta Gayle for the Respondent/Claimant

Heard: May 29, 2019 and July 29, 2019

**Application to set aside - Substituted service - Enlargement of time - Overriding objective - Importance of time limits - Application to set aside without notice order - Whether insurance company has done enough to bring documents to insured's attention.**

**T. HUTCHINSON, J (AG.)**

**INTRODUCTION**

**[1]** The matter for decision arises from a notice of application for Court Orders which was filed on the 10th of April 2018. In this application the Applicant seeks the following orders;

a. That they be granted permission to intervene in this matter to make this application.

b. That they be granted permission to make this application to set aside Master P. Mason (sic) for substituted service dated the 30th November 2016 pursuant to Rule 11.18(1) of the CPR out of time.

c. That the said Order be set aside.

d. That pursuant to Rule 26.8 of the Civil Procedure Rules the Applicant be granted relief from sanctions in respect of the application herein.

e. Such further relief as may be just.

f. That costs of this Application be awarded against the Respondent.

**[2]** An affidavit in support of the application has been provided by Ruthann Morrison, Legal Adviser with the Applicant in which she outlines the grounds on which this application is made.

**[3]** The application is opposed by the Respondent/Claimant who have outlined their position in the Affidavit of Ms. Dameta Gayle, Counsel for the Claimant.

**BACKGROUND**

**[4]** The claim, in respect of which this application is made, was brought as as a result of a motor vehicle accident which is said to have occurred along King Street, Kingston on the 18th of February 2008. It is said that a motor vehicle owned by the second defendant and insured by the Applicant collided with the Claimant who was standing along the sidewalk. At the time of this collision, the vehicle was being driven by the first defendant who the Claimant stated was acting as a servant and/or agent of the second defendant.

**[5]** As a result of the collision the Claimant sustained a number of injuries for which she had to be treated at the hospital. She also incurred financial expenses in respect of same and as a result she instructed her attorney to bring an action against the Defendants

**[6]** The Claim Form and Particulars were filed on the 15th of February 2013 and on the same date Notice of Proceedings addressed to the Applicant was filed and subsequently served.

**[7]** On the 4th of April 2016 the Claimant filed an application for Court Orders seeking that she be at liberty to dispense with personal service of the Claim Form and Particulars of Claim and that these document be served on the Insurance Company Advantage General Insurance Company (AGIC) instead. The matter was not heard on the original hearing date and an application for re-listing of this application was filed on the 28th of July 2016.

**[8]** An affidavit of Ms. Dameta Gayle in support of this application was subsequently filed on the 5th of August 2016. In the affidavit it was outlined that the basis of the application was grounded in the fact that the Process Server had visited the address of the second defendant on several occasions but he wasn't found neither could he be located elsewhere.

**[9]** It was also outlined in the affidavit that letters in respect of the collision and claim had been sent to the Insurers office in November 2012 and January 2013, this was in addition to the Notice of Proceedings which had been sent when this action was filed. Counsel made reference to the fact that the Company had provided a response on February 25th, 2013 denying liability on the basis that the information in their possession disclosed that the vehicle had been taken by the 1st Defendant without the permission of the Insured, who was abroad at that time and it was recommended that the Claimant should pursue her action against the 1st Defendant.

**[10]** In respect of that recommendation Ms Gayle outlined that efforts had been made to pursue the matter in that regard but they were unable to locate the 1st Defendant hence this application to bring the matter to the attention of both Defendants.

**[11]** On the 30th of November 2016 the application for substituted service was granted by Master P. Mason, this was served on the Applicant on the 28th of December

2016 and on the 2nd of March 2017 Final Judgment in Default of Defence was entered. The current application was then filed.

**APPLICANT'S SUBMISSIONS**

**[12]** Counsel for the Applicant has asked this Court to accept the contents of the affidavit of Ms Anderson as providing a sufficient basis for granting the orders sought. He has drawn the Court's attention to paragraphs 4, 5 and 6 in which it was outlined that the Applicant had no contractual relationship with the first defendant as he was not insured by the company, neither did he appear on the policy of the second defendant as a designated driver.

**[13]** It was also highlighted that as a result of this they had no contact information for him on file and all efforts to reach him at a telephone number and Mandeville address provided by their insured were unsuccessful. Additionally, the details of the address which was provided to them was too vague to allow for written correspondence to be sent to him.

**[14]** In respect of the 2nd Defendant, the Applicant asserted that the policy lapsed on the 30th of May 2014 and has not been renewed since, neither did the Insured effect any other insurance policy with AGIC. In outlining the efforts made to contact him paragraphs 10 and 11 state that a letter was sent to him after being served with the Notice of Proceedings on the 27th of March 2013 which was returned unclaimed and all calls to his known telephone numbers were unsuccessful.

**[15]** The Applicant accepted that on the 28th of December 2016 they were served with an unsigned copy of the Formal Order of Master P Mason dated the 30th of November 2016 which was filed on the 8th of December 2016. On receipt of same additional efforts were made to contact the second defendant by sending the relevant documents to three addresses associated with him as shown on the claim form, the motor claim form and his drivers' licence respectively. The documents all returned to them unclaimed.

**[16]** It is averred and submitted that the Applicant has exhausted all reasonable means of getting this claim to the attention of the Defendants herein. The explanation for the delay in applying to have this Order set aside was said to be due to the continued efforts of the Applicant and their Attorneys to contact the Defendant by telephone or mail all to no avail.

**[17]** Counsel for the Applicant has asked that the Applicant be granted relief from sanctions on the basis that they were unable to file a Defence due to their inability to locate the 2nd Defendant and to take instructions.

**RESPONDENT'S SUBMISSIONS**

**[18]** In response to the submissions advanced by Mr. Gardner on behalf of the Applicant Counsel for the Respondent has asked that the Court deny the application in full and impose the relevant sanctions. In advancing this position, Ms. Gayle has referred to and relied on her affidavit filed on the 22nd of February 2019 where the chronology of events was outlined.

**[19]** She has highlighted the fact that on the 18th of February 2013 the Notice of Proceedings was served on the Applicant and a letter dated the 25th of February 2013 was subsequently received from them denying liability. The contents of this letter was referred to earlier.

**[20]** The order for substituted service was subsequently obtained and served on the Applicant along with the Claim Form, Particulars and a 'courtesy' (unsigned) copy of the Formal Order with a cover letter apologizing for the latter and providing an undertaking to provide a signed copy in due course.

**[21]** Counsel accepted that in response to the service of these documents, the Applicant sent a letter dated the 18th of January 2017 which was received by them on the 20th of the same month. In the letter the Applicant advised that the 2nd Defendant had not been with the Company for almost 3 years and they were not yet in a position to determine if they could bring the matter to his attention. The

position in respect of having no contractual relationship with, or information for, the 1st Defendant was also conveyed.

**[22]** Ms Gayle has submitted that no acknowledgment of service or Defence having been filed Judgment in Default was properly obtained on the 2nd of March 2017. The Notice of Assessment of Damages was served on the Applicant on the 15th of February 2018 and it was only then, a period of two and a half months later that any action was taken by the Applicant to have the Orders made set aside.

**DISCUSSION/ANALYSIS**

**[23]** In making their respective submissions neither Counsel sought to refer to or rely on any authorities or particular rules. In treating with the issue however, it is important for the Court to consider the guidance provided by the rules as well as in decided cases on the point.

**Substituted Service**

**[24]** 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, at 5.13(1) it is stated that 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.

**[25]** 5.13(3) provides that 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; or (ii) it is likely that he or she would have been able to do so; (c) state the time when the person served was or was likely to have been in a position to ascertain the contents of the documents; and (d) exhibit a copy of the documents served."

**[26]** Rule 5.14 of the CPR provides: "(1) The Court may direct that service of a claim form by a method specified in the Court's order be deemed to be good service. (2) An application for an order to serve by a specified method may be made without notice but must be supported by evidence on affidavit- (a) specifying the method of service proposed; and (b) showing that that method of service is likely to enable the person to be served to ascertain the contents of the Claim Form and Particulars of Claim."(emphasis supplied) In the instant case the Application of the Respondent/Claimant was made pursuant to Rule 5.14.

**Extension of Time for Application to Set Aside**

**[27]** In respect of the Application to have this order set aside, the Applicant is asking that the Court exercise its powers pursuant to Rule 11.18 but given that the order was made on a without notice application it may be that Rules 11.16(1) and (2) of the CPR may be more applicable which provides; (1) A respondent to whom notice of an application was not given may apply to the Court for any order made on the application to be set aside or varied and for the application to be dealt with again; (2) A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent."

**[28]** Also relevant to the determination of this application are Rule 1.1 and Rule 26(2)(c) of the CPR, on the powers of the Court in the management of cases. Rule 1.1(1) and 1.1(2)(d) of the CPR provide: 1.1 (1) These Rules are a new procedural code with the overriding objective of enabling the Court to deal with cases justly. (2) Dealing justly with a case includes - (d) ensuring that it is dealt with expeditiously and fairly.

**[29]** 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"

**[30]** In treating with this issue, useful guidance is provided in ***Moranda Clarke v Dion Marie Godson etal [2015] JMSC Civ 44*** *a decision of* Master Bertram Linton as she then. In that matter, a similar application was being pursued and the Learned Master carried out a careful and comprehensive review of a number of Pre-CPR authorities such as ***Wood v H.G Legions Ltd and Another (1995) 48 WIR 240*** and ***Port Services Ltd v Mobay Undersea Towns SCCA No 18/2001 (delivered March 11, 2002)*** which examined the posture of the Court when timelines were not complied with. She also referenced the dicta of Cooke JA in ***Alcan Jamaica Company v Herbert Johnson & Idel Thompson-Clarke SCCA 20 of 2003 (delivered 30th July 2004)*** where he stated in reference to the CPR and the timelines provided for therein;

> *"These rules are the antidote to the epidemic of delay against which Panton JA so rightly inveighed in Wood."*

**[31]** On concluding this review, wherein it was evident that the views of the Court weighed heavily in favour of timelines being adhered to, she stated

> 'It is within this context that I say that a mandatory timeline was being dictated under Rule 11.16(2).'

**[32]** This was not the end of the matter however as she went on to add;

> 'The Rules however …under Rule 26.1(2) correspondingly provides for the extending of the time for such an application in the exercise of the court's discretion and this provides some flexibility to ensure that justice is done'.

**[33]** In support of this position she highlighted the dicta of Brooks JA at paragraph 12 of ***Hoip Gregory v Vincent Armstrong SCCA No 80 of 2006 Application No 81/2006; Hoip Gregory v O'Brien Kennedy SCCA No 81 of 2006; Application No 165/2006 delivered 23rd August 2012***. Where he said;

"… there are circumstances which sometimes arise that require a defaulting applicant to succeed despite his default. In some of those circumstances, practicality demands that successful result."

**[34]** The Learned Master then went on to conclude that the overriding objective would best be served by recognizing that the 1st defendant (in that case) was in breach of the mandatory rule in Rule 11.16 (2) in failing to apply to have the order for substituted service set aside within 14 days of the service upon her of the order for default judgment, but the court's discretion is justly exercised in allowing the substantial issues to be considered by enlarging the time to file the application in her favour.

**[35]** Consideration was also given to the dicta of Panton JA in ***Leymon Strachan v The Gleaner Company Limited and Stokes (Motion No 12/1999, judgment delivered 6 December 1999, page 20)***, a useful Pre-CPR decision, where he set out the principles that should guide the Court in considering an application to extend time generally:

'The legal position may therefore be summarised thus:

(1) Rules of Court providing a time-table for the conduct of litigation must, prima facie, be obeyed.
(2) Where there has been a non-compliance with a timetable, the Court has a discretion to extend time.
(3) In exercising its discretion, the Court will consider - (i) the length of the delay; (ii) the reasons for the delay; and (iv) the degree of prejudice to the other parties if time is extended.
(4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."

**[36]** In asking the Court to allow them to bring this application over a year after they had been served with the order for substituted service and two and a half months after they had been put on notice of the Default Judgment entered against them it is evident that the Applicant is in breach of Rule 11.16. They have however made reference to the efforts which they contend were being made to locate the defendants as being the reason for the delay and on the basis of same they have asked that the time be enlarged.

**[37]** While I acknowledge that the application comes at a very late stage in the proceedings, I take note of the explanation which has been offered for the delay and note that this was not a situation in which the Applicant had been content to sit idly by while the time elapsed; but based on the affidavit of Ms Anderson, had been making efforts to comply with the order served on them in December 2016. In light of this I am prepared to adopt the reasoning of the Court in the ***Moranda Clarke*** and ***Leymon Strachan*** decisions and exercise my discretion pursuant to Rule 26.2 to enlarge the time within which this Application can be made.

**Were the documents served likely to come to the attention of the 1st and 2nd Defendants?**

**[38]** In considering this issue, I was guided by the principles outlined in ***Porter v Freudenberg; Krelinger v Samuel and Rosenfield; Re Merten's Patent: [1915] 1 KB 857***, where in examining the purpose for which a court would allow an order for substituted service Lord Reading CJ stated at pages 887-888) as follows;

> "[a Defendant] is, according to the fundamental principles of English law, entitled to effective notice of the proceedings against him.… In order that substituted service may be permitted, it must be clearly shown that the plaintiff is in fact unable to effect personal service and that the writ is likely to reach the Defendant or to come to his knowledge if the method of substituted service which is asked for by the plaintiff is adopted." (emphasis supplied).

**[39]** For the order to be made the Court must be satisfied that despite their best efforts the Claimant was unable to locate the Defendants and the circumstances were as such that service on the insurance company would assist in bringing the documents to their attention.

**[40]** On a review of the circumstances that existed at the time of the Application it is clear that whereas this may have been a possibility in respect of the 2nd Defendant. The situation was very different in respect of the 1st Defendant as the Applicant had no viable contact details for him. They had been unsuccessful in contacting him at the number and address provided by the 2nd Defendant and unlike the former they had no contractual relationship with him.

**[41]** In considering whether the order ought to be set aside, one of the primary considerations is whether the Applicant has demonstrated that it; 'has made reasonable efforts to locate the 2nd Defendant. On this point I am guided by the Court of Appeal decision of ***British Caribbean Insurance Company Limited v David Barrett and Others [2014] JMCA App 5***. In that decision, Brooks JA considered the efforts made by the Applicant insurance company to locate a Defendant (Ivor Leigh Ruddock) with whom an insurance contract had existed, and to locate the driver of the vehicle (Jason Evans).

**[42]** As in the instant case, BCIC applied to have the substituted service order set aside on the basis that efforts were made to locate the Defendants without success, and the Applicant relied on the fact that it had sent letters and made telephone calls. It was the decision of the Court that the learned Master could not be criticised for refusing to exercise her discretion to set aside the substituted service order on the basis that BCIC had not made all reasonable efforts to contact Mr Ruddock, as there was no evidence that the letters sent were sent to his home address or that efforts were made to personally deliver any letter to either the home or work address.

**[43]** Paragraph 35 of the dicta of Morrison JA as he then was in the decision ***ICWI v Allen (Shelton) et al [2011] JMCA Civ 33*** is also of great assistance where he stated:

> *The plethora of references in rule 5.13 to the need for evidence of the likelihood of the claim form coming to the attention of the defendants by the claimant's choice of an alternative method of service seems to me to be a clear indication that the framers of the rule intended thereby to subject the option given to the claimant to the tightest possible control. Whatever may have been the history of the requirement under the Pre-CPR rules and practice as regards the question of the likelihood of the substituted method of service bringing the documents to the notice of the defendant, it appears to me from the language of rule 5.13 to be unarguably clear that the option given to the claimant to choose an alternate method of service is expressly subject to the claimant being able to satisfy the court on affidavit either that the defendant was in fact able to ascertain the contents of the affidavit (rule 5.13(3)(b)(i) or that is likely that he or she would be able to do so (rule 5.13(3)(b)(ii) (emphasis supplied).*

**[44]** Having arrived at this conclusion the Learned Judge then went on at paragraph 41 of the Judgement to state his views on the application before the Court as follows;

> *In support of its application to set aside the order for substituted service the* appellant *adduced evidence which was uncontradicted, that it had no report from the 3rd respondent of the accident which gave rise to this claim, that it was unable to locate or contact him and that it had no knowledge of his current address. It seems to me that there was therefore no evidence before the Master that could possibly satisfy the Court that, if the claim form was served on the appellant, the 3rd respondent would in fact have been able to ascertain the contents of the documents or that it was likely that he would*

*have been able to do so as the rules require in these circumstances (emphasis supplied)*

**[45]** In the matter before the Court, it is clear from an examination of the affidavit evidence of Ms Morrison as well as that of Counsel for the Claimant that in respect of the 1st Defendant there had always been a challenge in locating him in order to have him served with the documents. The efforts made on behalf of the Claimant were unsuccessful prompting them to adopt this course.

**[46]** Additionally, it is not in dispute that the Applicant had indicated its position in respect of the 1st Defendant to Counsel for the Claimant from very early in the proceedings. The evidence of Ms. Anderson revealed that even with the benefit of the information provided to them they were unable to locate or even communicate with him.

**[47]** Accordingly, the Applicant found themselves in a situation where they were not in a position to bring the proceedings to the attention of the first defendant.

**[48]** In respect of Mr. Ye, the second defendant, Counsel for the Claimant had been advised that he was no longer insured by them, that relationship having come to an end in May 2014. It was also noted they were not yet in a position to determine whether they would be in a position to bring the matter to his attention. This was in the context where they had been unsuccessful in bringing the notice of proceedings to his attention in 2013.

**[49]** In paragraph 15 of her affidavit Ms. Anderson outlined the efforts which were then made to bring the Claim Form and Particulars to the attention of the second defendant, this took the form of sending the documents by regular and registered mail to three addresses;

*a.* 3 Halifax Avenue, Kingston 6 which was the address on the claim form.

*b.* 80 Princess Street, Kingston which was the address on his motor claim form; and

*c.* 32 King's House Road, Kingston which is the address on his driver's licence.

All the documents were returned unclaimed,

**[50]** In respect of the 2nd Defendant, there is no dispute that at the time of the accident and the service of the Notice of Proceedings the Applicant had a contractual relationship with him and ought to have been able to make contact with him. At the time that the order was made however, it is clear that things had changed. In spite of the change the Applicant made efforts to have the documents brought to the attention of the 2nd Defendant.

**[51]** The outcome of these efforts was that they were unable to make contact with him and as such the contents of the documents served on them were never brought to his attention. It is settled law as stated in ***Porter v Freudenberg; Krelinger v Samuel and Rosenfield; Re Merten's Patent: [1915] 1 KB 857*** that the sole basis on which a Court would grant such an order is to ensure that the defendant would have been able to ascertain the contents of the document or that it was likely that he would have been able to do so. If this cannot be achieved by the individual or body on whom this service is effected, then the purpose would not have been achieved. This position is also reflected in ***ICWI v Allen (Shelton)*** and several other decisions on this point.

**[52]** The situation herein can be distinguished from that which existed in ***BCIC v Barrett etal*** as efforts had been made to locate the Defendant at all addresses within the Applicant's possession, one of which appears to have been his residence given that it appeared on his driver's licence. While it is usually the case that the Affidavit would have exhibited the registration slips and return endorsement this was not done in this case but I am mindful of the fact that this was unchallenged evidence

and as such it was not a situation in which there was a requirement for proof of service.

**[53]** Having reviewed all the evidence, I am satisfied on a balance of probabilities that reasonable efforts were made by the Applicant to locate both Defendants. In light of their inability to do so the purpose of the order has not been fulfilled and as such it cannot stand.

**[54]** The Application is granted in the terms outlined below;

The Applicant;

a. Is granted permission to intervene in this matter to make this application.

b. An extension of time is granted permission to make this application to set aside the order of Master P. Mason for substituted service.

c. The said Order is set aside and all orders flowing therefrom.

d. The application for costs to be awarded against the Respondent this application is refused.

e. Applicant’s attorney to prepare, file and serve order herein.