[2020] JMSC Civ 175

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015HCV04408

BETWEEN	**ORAL WILLIAMS**	**CLAIMANT**
AND	**DIAMOND PAINTS MFG CO LTD**	**DEFENDANT**

IN CHAMBERS (VIA ZOOM)

Ms Toni Ann Farquaharson and Ms Barbara Barnaby instructed by Barbara Barnaby Attorney-at-law for the Claimant/Respondent

Mr Jerome Spencer and Mr Gilroy English instructed by Gilroy English & Co Attorneys-at-law for the Defendant/Applicant

Heard: July 15, 2020, July 23, 2020 and August 4, 2020

Civil Procedure - Application to set aside default Judgment – Civil Procedure Rule 12.4 and CPR 12.5, CPR 13.2 and 13.3 and CPR 26.1

MOTT TULLOCH-REID, MASTER

BACKGROUND

[1] The Defendant has applied to the Court for an order setting aside the Default Judgment which was entered in the Claimant's favour in default of Acknowledgment of Service on August 23, 2016 in Judgment Binder No 767 Folio 450. The application was filed on March 5, 2020. The grounds of the application include:

a. The conditions for entry of Judgment in Default were not satisfied at the time the request for same was made.
b. In any event, the Defendant has a real prospect of successfully defending the claim.
c. The application is made pursuant to Rule 13.2 and alternatively Rule 13.3 of the Civil Procedure Rules.

[2] The application is supported by affidavits of Dellevale Banbury and Kirk Moore. Both affidavits were filed on March 3, 2020. They give evidence as it relates to the issue of liability but they do not give evidence as it relates to the issue of service. The Affidavit of Mario Dunkley filed on July 13, 2020 speaks to the issue of service. Mr Dunkley swears that he is the General Manager and has been the Defendant's General Manager for over 30 years. He swears that the Defendant was not served by fax in September 2015 and that the first time the documents were received by the company was when they were delivered to the company in October 2016 along with the Default Judgment and other documents.

Service by fax

[3] Ms Rochelle Mills and Ms Annica Smith, deponents for the Claimant, say otherwise. They say in their affidavits that there was a fax transmission to the defendant which receipt was confirmed by Ms Smith, who was employed to the Defendant at the time, as a receptionist. They say the documents were served in September 2015. Ms Farquaharson at paragraph 13 of her written submissions states that Mr Dunkley is not being honest when he says he was never served by fax in September 2015. She says he admits in his affidavit that the company did not receive a form defence on September 23, 2015 in his Affidavit filed on July 13, 2020 and that that is confirmation that the company was served with the Claim Form and other documents. I do not agree with that interpretation of Mr Dunkley's evidence. I understand Mr Dunkley to be saying the company did not receive a fax transmission of the initiating documents in September 2015, it only received

the documents in October 2016 and that at no time, neither in October 2016 nor in September 2015 or at any time at all did the company receive a Form Defence.

[4] Ms Farquaharson's argument that because the Request for Default Judgment was served on the Defendant in February 2016, it means the initiating documents were also served (see paragraph 16 of the written submissions filed on July 21, 2020) is also flawed. These are two independent actions. By virtue of the fact that the form defence was not served with the accompanying documents, I must also consider whether service was regular or not and whether the default judgment was regularly obtained. It is regularly obtained if the conditions in CPR 12.4 have been met and one of the conditions is that service by fax must be proved.

[5] CPR 5.12(2) sets out how service by fax is proved. It provides that:

> *"(1) Service by FAX is proved by an affidavit of service by the person responsible for transmitting the claim form to the person to be served.*
>
> *(2) The affidavit must exhibit –*
>
> *(a) a copy of the document served;*
>
> *(b) a copy of any cover sheet to that document; and*
>
> *(c) a copy of the transmission record*
>
> *and must state –*
>
> *(i) the date and time of transmissions; and*
>
> *(ii) the FAX number to which it was sent.*

[6] The Defendant's attorneys-at-law submit that in making his request for default judgment, the Claimant did not comply with CPR 5.12(2) and that service by fax was therefore not proved. Mr Spencer argues that the affidavit of service does not have a copy of the transmission sheet exhibited or the date and time of the transmission or the number to which the fax was sent. He says that the Default Judgment on which the Request was made and service proved was irregular and should therefore be set aside.

[7] CPR 12.4 sets out the conditions that must be satisfied for judgment to be entered for failure to file an acknowledgment of service. It reads as follows:

> *The Registry at the request of the claimant must enter judgment against a defendant for failure to file an acknowledgment of service,* ***if the claimant proves service of the claim form and particulars of claim on that defendant.*** *(my emphasis)*

The Claimant did not comply with all of the conditions to prove service by fax as set out in CPR 5.12. The Affidavit of Service sworn to by Rochelle Mills on February 5, 2016 and filed on February 11, 2016 does not exhibit a copy of the document served, a copy of the cover sheet to that document, a copy of the transmission record and it does not state that fax number to which the fax transmission was sent. It does however provide evidence of the transmission being received by the Defendant's receptionist. It is this evidence which I have formed the opinion that the Registrar acted on in entering the Default Judgment.

[8] I wish to here highlight the title to CPR 26.9. It reads as follows:

> *"General power of the court to rectify matters where there has been a procedural error"*

CPR 26.9 goes on to provide as follows:

> 1. *"This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.*
>
> 2. *An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.*
>
> 3. *Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.*
>
> 4. *The court may make such an order on or without an application by a party.'"*

I believe it is important to raise this part of the CPR because it makes it clear that the Claimant's failure to comply with CPR 5.12 does not invalidate a step taken in the proceedings unless the court so orders. Part 2.5(1) provides that

> *"Except where any enactment, rule or practice direction provides otherwise, the functions of the court may be exercised in accordance with these Rules and any direction made by the Chief Justice by –*
>
> *(a) a single judge of the court;*
>
> *(b) a master; or*
>
> *(c) a registrar.*

Part 26.9 does not specifically refer to a judge validating the procedural irregularity and therefore it is my view that the registrar is also able to do so. On the facts before me, I have formed the view that if on the evidence before her at the time the request for default judgment was made, the Registrar believed that service by fax was sufficiently proved even though Part 5.12 conditions were not complied with fully, she was well within her right to grant the request and by doing so validated that procedural error. I am also of the view that the documents were served by fax and I form this view based on the evidence contained in the Affidavit of Rochelle Mills filed on February 11, 2016.

Evidence contesting service by fax

[9] For the sake of completeness, I must point out the chronology of how this evidence came to the court. Albeit it that the Defendant's application to set aside the default judgment was made in March 2020, the affidavits which supported the application initially, both of which were also filed in March 2020, did not speak to the issue of service. The first time that the issue of service came into play was on July 13, 2020 when the Affidavit of Mark Dunkley was filed in Court. The document was served on the Claimant's attorney-at-law on July 14, 2020, one day prior to the hearing of the claim. The Claimant's attorneys-at-law however did not raise the issue of being short-served with the document and their desire to be given the opportunity to respond, until the Defendant's attorney-at-law had completed his submissions on the application. The Claimant's attorneys did not object to the late filing and service of the documents, with the view that the Court should not consider it at this late stage, as I had expected them to do, they submitted instead, that their client wanted the opportunity to file Affidavits in Response. In the circumstances,

I had to give the Claimant the opportunity to do so. Had the issue of the short service and the objection to it, been raised at the start of the hearing of the application, I would not have commenced the hearing. The hearing ought properly to have been commenced when the applications, all affidavits in support and affidavits in response were filed in Court and served within the requisite time period. The Court would then have been in a position to make orders for the affiants to be cross-examined so that the issue of service could be tested. We have found ourselves in an untidy state of affairs because attorneys-at-law continue to be tardy in the filing of the relevant documents that will put their matters completely before the Court. I am therefore without the tested evidence of Mr Dunkley, Ms Mills and Ms Smith. I however do not feel that I am completely hindered in my ability to make a fair ruling because as I have stated above, the evidence filed on February 11, 2016 in the Affidavit of Ms Rochelle Mills at the time the Request for Default Judgment was being made, has satisfied me that there was indeed service by fax. Additionally, I must also contend with the failure of the Claimant's attorneys-at-law to include the form defence in the bundle of documents served on the Defendant as is required by CPR 8.16(1) as this will also impact any decision I make with respect the issue of service.

Form Defence not served with the initiating documents

[10] Mr Dunkley depones that the form defence was not served – not in September 2015 as alleged by the Claimant nor in October 2016 when the Defendant is alleged to have first received the Claim Form and Particulars of Claim. Ms Farquaharson agrees that this is true and I also see this evidenced in the Affidavit of Rochelle Mills filed on February 11, 2016. Let me also make it very clear that the service of the initiating documents on the Defendant by hand in October 2016, would not amount to effective service as the Claim Form was filed in September 2015 and its validity would have expired by then. In addition, I must agree with Mr Spencer that the service of the initiating documents, at a time when the default judgment had already been entered could not make the service of the claim form valid as the claim form must be served and proved to have been served before a

default judgment can be entered. I do note however, the evidence in support of the Claimant's position that service in October was a re-service, which was done out of an abundance of caution and therefore take this to mean that the Claimant's evidence as it relates to the service of the initiating documents is tied, not to an October 2016 date but to the September 2015 date when the documents were served by fax.

[11] Mr Spencer argues that since the Defendant was not served with all the documents mandated by CPR 8.16 the service was also irregular and the default judgment was also irregular and must be set aside.

[12] I was assisted greatly in my analysis of this issue by the cases of Joseph Nanco v Anthony Lugg and B&J Equipment Rental Limited [2012] JSMC Civ 81 and **Dorothy Vendryes v Dr Richard Keane and Karen Keane [2011] JMCA Civ 15.** In the **Vendryes case** Harris JA (now retired) held that if CPR 8.16(1) was not complied with, the sanction would be that a default judgment would be set aside in circumstances where the documents were not served with the Claim Form. I am unable to deviate from this principle of law and so I must conclude that there was a failure on the part of the Claimant when serving the initiating documents.

[13] Neither CPR 5.12 nor CPR 8.16 indicates what the sanction is for non-compliance with the rule. The failure to comply with the rule does not invalidate the step unless the Court so orders and the Court is at liberty to, on its own initiative, take steps to make matters right (see CPR 26.9(2) and CPR 26.9(4) which were quoted verbatim in paragraph 8 above. Although I am constrained by the **Vendrys** decision as it relates to the irregularity of service, I must contemplate whether in the circumstances of the case before me I can use my initiative to take steps to correct a procedural irregularity.

[14] Ms Farquaharson invites me to consider that the irregularity in service was waived by the Defendant as it has participated in the proceedings in much the same manner that the Defendant participated in the **Nanco case.** She argues that by

so participating the Defendant has waived the irregularity of service and as such cannot now seek to set aside the default judgment based on that irregularity.

Has the defendant waived the irregularity of service

[15] Ms Farquaharson argues that the Defendant has waived the irregularity of service because the Defendant's attorney appeared in Court and participated in the proceedings at the Assessment of Damages. I have the benefit of the minute sheets and note that Mr English first appeared in Court for the Defendant at the Assessment of Damages on February 1, 2019 when he indicated to Morrison J that he had just been retained by the Defendant and was therefore seeking an adjournment. Costs were awarded to the Claimant on that occasion for the adjournment. I also note that on February 1, 2019 the Defendant's attorneys filed an Acknowledgment of Service indicating that the Defendant was served on October 27, 2016 and noting an intention to defend the claim. The acknowledgment of service did not say that they intended to dispute the Court's jurisdiction. On March 5, 2020, the Defendant's attorneys filed another Acknowledgment of Service. This time they were unable to say when the Claim Form and Particulars of Claim were served on the Defendant and they again indicated that they intended to defend the claim on their client's behalf. It is quite curious that the same attorney would file two different acknowledgments of service and say in one that their client was served on October 27, 2016 but in another, which is not an amended Acknowledgment of Service that they are unaware as to when the initiating documents were served. Additionally, throughout their submissions and the affidavits filed in support of their application, the date of the defendants say they first came to be aware of the initiating documents was October 27, 2016. On March 5, 2020 a Notice of Preliminary Objection was filed by the Defendant's attorneys on the basis that they were applying to set aside the default judgment. Again the issue of the Court's lack of jurisdiction pursuant to CPR 9.6 was not raised.

[16] Mr Spencer argues that CPR 9.6 cannot come into play at this point in time because that application objecting to the court exercising jurisdiction would have to be made before the default judgment was entered. The Default Judgment was entered in August 2016. CPR 9.6 provides that

> *"1. A defendant who*
>
> *(a) disputes the court's jurisdiction to try the claim*
>
> *(b) argues that the court should not exercise its jurisdiction, may apply to the court for a declaration to that effect.*
>
> *2. A defendant who wishes to make an application under paragraph (1) must first file an acknowledgment of service.*
>
> *3. An application under this rule must be made within the period for filing a defence."…*

[17] Mr Spencer's argument that the application would have to be made before default judgment is entered would be sustainable if the Defendant had filed an acknowledgment of service before the default judgment was entered as was done in the **Nanco case.** However, in circumstances where the Defendant is saying he was not served until October 2016, it is expected that the Defendant would still want to dispute the court's jurisdiction to try the claim for various reasons:

(a) The form defence was not attached to the documents served on it;

(b) The claim form when it was served on it would have been invalid at the time and therefore the claim was a nullity

(c) At the time they served with the claim form, whose validity had not been extended, the limitation period for the cause of action which is alleged to have arisen October 26, 2009 would have expired and the Defendant would have the benefit of a limitation defence.

None of this was done. All that was done was an application to set aside the default judgment and even in this hearing the Court's jurisdiction to hear the matter on the bases noted in paragraph 17(a)-(c) above was not called into question.

[18] Does this failure however mean they have waived the irregularity of service? In the case of **Nanco,** the Defendant's attorney, filed an Acknowledgment of Service, participated in the hearing of the application for interim payment and in the assessment of damages. Ms Farquaharson submits that the Defendant has waived the irregularity because the Defendant's attorney participated in the Assessment of Damages. I do not find that he did. The Minute Sheet records that he participated only to the extent of informing the Court that he had recently been retained. In the **Nanco** case there was a full on hearing of the Assessment of Damages in which the Defendant's attorney appeared to have participated. The minute sheet does not record an issue of short service as reported by Ms Farquarharson in her submissions (see paragraph 37 of the written submissions filed on July 21, 2020 and paragraph 7 of the Affidavit of Mr Dunkley filed July 13, 2020) but even if that were so, I do not find that to inform the court of short service is tantamount to participating actively in the case. In the **Nanco case** on which the Claimant relies, McDonald-Bishop J at paragraph 59 said

> *"I find that the 2nd defendant, therefore, by acknowledging service, by indicating an intention to defend and then by actively taking part in other aspects of the proceedings, without any application under rule 9.6 had waived the irregularity…"*

All three together, and in my view, the active participation in the proceedings, in particular, led her to form her opinion. Here the Defendant acknowledged service, indicated an intention to defend but did nothing thereafter except to apply to set aside the default judgment. That, to my mind, is a part of how the defendant puts up a defence on his own behalf. It did not waive the irregularity of the service. The application and the affidavit of Mark Dunkley suggests there was an irregularity with how the default judgment was entered and that the form defence was not served with the claim form. In this situation the decision of Harris JA in the **Vendrys case** must continue to guide the court.

[19] Harris JA in delivering the judgment of the Court of Appeal stated at paragraph 12:

> *"Rule 8.16(1) expressly specified that, at the time of service, the requisite forms must accompany the claim form. The language of the rule is plain and precise. The word "must" as used in the context of the rule is absolute. It places on a claimant a strict and an unqualified duty to adhere to its conformity. Failure to comply with the rule as mandated offends the rule and clearly amounts to an irregularity which demands that, in keeping with the dictates of rule 13.2 the default judgment* ***must*** *be set aside (my emphasis)"*

[20] Since the default judgment must be set aside, I need go no further to consider whether the Defendant has a real prospect of successfully defending the claim. I therefore order as follows:

a. Default Judgment entered in Judgment Binder 767 Folio 450 on August 23, 2016 in favour of the Claimant is set aside.

b. Costs in the application are to be paid by the Claimant to the Defendant and those costs are to be taxed if not agreed.

c. The Defendant's attorneys-at-law are to file and serve the formal order.