**[2014] JMSC Civ. 119**

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

**CLAIM NO. 2012 HCV 02551**

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| **BETWEEN** | **SHIRLEY BEECHAM** | **CLAIMANT** |
| **AND** | **FONTANA MONTEGO BAY LTD. t/a FONTANA PHARMACY** | **DEFENDANT** |

**Tamiko Smith, instructed by Frater, Ennis & Gordon for the Claimant**

**Reiba Harper, of counsel, for the Defendant**

**Heard: May 22 and 26, 2014**

**APPLICATION TO SET ASIDE DEFAULT JUDGMENT – SERVICE BY REGISTERED POST – PRESUMPTION OF SERVICE – DISPLACEMENT OF PRESUMPTION OF SERVICE – DEFAULT JUDGMENT IRREGULARLY ENTERED – IMPROPER PARTY NAMED AS DEFENDANT – SUBSTITUTION OF DEFENDANT – DEFENCE WITH REALISTIC PROSPECT OF SUCCESS – DUTY OWED BY OCCUPIER TO TRESPASSER**

**ANDERSON, K., J**

[1] The defendant filed on April 15, 2013, an application to set aside default judgment. That application was, with this court's permission, amended at a hearing in Chambers, which was held on July 8, 2014.

[2] That application is supported by the affidavit of R. Therrien, which was filed on April 15, 2013.

[3] Two affidavits were filed by the claimant in response and both of those affidavits have been deponed to by attorney Tamiko Smith. Those affidavits were respectively filed on January 20, 2014 and February 27, 2014.

[4] A further affidavit was deponed to by R. Therrien and filed on June 5, 2014, in response to the affidavit evidence of Tamiko Smith. This court has given careful consideration to the defendant's amended application for court orders and all affidavit evidence both in support as well as in opposition to said amended application.

[5] The parties named in this matter, are: Shirley Beecham – claimant and Fontana Montego Bay Ltd. – defendant. The heading of this claim on the claim form states that the defendant is trading as 'Fontana Pharmacy.'

[6] The defendant has contended that it does not trade as 'Fontana Pharmacy' and that instead, it is 'Fontana Ltd.' that trades as 'Fontana Pharmacy.' It has given evidence of this, via one of the directors of Fontana Ltd. – Mr. Raymond Therrien, who is also a director of Fontana Montego Bay Ltd. The claimant has, essentially, asked this court to draw the inference that the defendant trades as 'Fontana Pharmacy,' but has not, as it could have done, brought before this court, any documentary evidence to prove that 'Fontana Pharmacy' is a business name registered under the Business Names Act and is a business name being utilized for trading purposes, by the defendant. Not surprisingly therefore, in her most recently filed affidavit evidence, attorney Tamiko Smith has expressly requested that this court substitute the name 'Fontana Ltd.' as defendant, trading as 'Fontana Pharmacy.' Nonetheless though, the claimant still seeks to obtain the benefit of the default judgment which was entered in her client's favour, as against the only named defendant, via the Registrar. As such, this court must first determine whether or not the default judgment entered against the defendant should be set aside and, it could only be, if that were done, that this court could then even properly be in a position to make an order substituting 'Fontana Ltd.' as the defendant, for the only named defendant at present, which is: 'Fontana Montego Bay Ltd.'

[7] What this court must first determine, in deciding on whether to set aside the default judgment, which was entered against the defendant, by order of the registrar, on January 31, 2013, is whether that judgment was irregularly entered. The view may be

held by some, that if so, this court has no discretion and must set it aside**.** The wording of **rule 13.2 (1) of the Civil Procedure Rules (CPR),** which is seemingly framed in mandatory terms, may be viewed by some, as necessitating such an interpretation. In particular, **rule 13.2 (1) (a) of the CPR** is applicable to this matter at this stage, since the default judgment was entered arising from the defendant's failure to file an acknowledgement of service within the requisite time period of 14 days, following upon that which the claimant has alleged, was the service upon them, via registered post, of the claim form, particulars of claim and other accompanying court documents.

[8] One of the conditions to be satisfied, if the registrar is to properly enter a default judgment against a defendant, arising from a failure by that defendant to file an acknowledgement of service within the requisite time period, is that the claimant '*must prove service of the claim form and particulars of claim on that defendant*.'

[9] **Rule 5.7 of the CPR** enables service on a limited company, such as is the defendant, via registered post addressed to the registered office of that company.

[10] **Rule 5.11 of the CPR** addresses the matter of proof of postal service. The rules of court cannot be read from segment to segment, or rule to rule, or even from part to part, in isolation. Instead, the rules should always be interpreted in terms of the rules set out therein, in the overall context of other pertinent rules of court. **Rule 5.11 (2) (b) of the CPR** therefore, when considered contextually, must be taken as requiring, in terms of proof of service upon a limited company, where the means of service utilized, is registered post, that the address to which that registered post was sent, must be shown to the Supreme Court registrar's satisfaction, to have been the registered office address of the defendant.

[11] The affidavit of service by registered mail, which was deponed to by a clerk in the law firm of Frater, Ennis & Gordon and filed on August 2, 2012, has stated that the claim form etc. were sent via registered mail and has exhibited thereto, the applicable registration slip, which is dated May 14, 2012. There was though, absolutely no affidavit

evidence provided to the registrar as to the registered office address of the defendant having been the address to which said documents were sent via registered post. Accordingly, the prerequisite condition for the entry of a default judgment against the defendant on the ground of failure to file an acknowledgement of service, was not met and as such, based on the evidence which was presented to her by the claimant leading up to the entry of the default judgment, it is apparent to this court, that the registrar erroneously and irregularly entered the default judgment against the defendant.

[12] Does this though, in and of itself, oblige this court, in each and every circumstance where that required evidence of service was deficient, in terms of the relevant rules of court, to set aside the default judgment irregularly so obtained? The language used in **rule 13.2 of the CPR** suggests that this is so. The word 'must' though, when used in statutory instruments or in legislation, is not always to be interpreted as being mandatory. See: **Charles (Herbert) v Judicial and Legal Service Commission and another** – [2002] 61 WIR 471/[2002] UKPC 34 and **Matthews (Charles) v The State** – [2000] 60 WIR 390, per de la Bastide CJ. See also: **Hoip Gregory v Vincent Armstrong** – SCCA No. 80 of 2006 – application No. 81 of 2006 and **Hoip Gregory v O'Brien Kennedy** – SCCA No. 81 of 2006 – application No. 165/2006.

[13] In the present case, the defence counsel has quite properly and laudably, conceded that the registered office address of the defendant is in fact: Fairview Shopping Center, Montego Bay Post Office, in the parish of St. James – this being the address made known to the registrar in the affidavit evidence of Ms. Whytehead, as being the address to which the relevant court documents were sent via registered post and to which the defendant did not respond by filing the requisite court documents within the requisite time period. Surely, such being the case, it would be a manifest injustice for the default judgment to be set aside and would also be a manifest wastage of time and costs, bearing in mind that, such being the case, it would be apparent to this court, that the defendant was presumptively served and thus, if there exists no evidence to displace that presumption, then the failure to have filed an acknowledgement of

service within 14 days of the date when the relevant court document were presumptively so served, must mean that this court, as a matter of justice, should take it that the default judgment was properly entered against the defendant. As such therefore, this court does not consider that in all circumstances, the provisions of **rule 13.2 (1) (a) of the CPR** are mandatory. This court though, does accept that the circumstances are extremely rare, in which the provisions of **rule 13.2 (1) (a) of the CPR** will not, whenever, in the case of failure to file an acknowledgement of service, any of the conditions of **rule 12.4** was not satisfied, result in an application to set aside default judgment being granted by this court, but, this is one of those extremely rare cases.

[14] In circumstances wherein a claim form and other court documents have purportedly been served by means of registered post, the same will, in accordance with our rules of court, be deemed to have been served, 21 days after the date indicated on the post office receipt. See **rule 5.19 (1) and 6.6 of the CPR** in that regard. **Rules 5.7 of the CPR** provides that service on a limited company – which is what the defendant is, may be effected by sending the claim form by prepaid registered post to the registered office of the company. That is the means of service upon the defendant, which was utilized by the claimant.

[15] As such, it is deemed by the court, unless the contrary has been shown, that the pertinent court documents were served on the defendant, as of 21 days after the date indicated on the post office receipt. In the case at hand, the date indicated on the post office receipt is: May 14, 2012. The default judgment was entered against the defendant on January 31, 2013 and was filed on August 28, 2012. As such, there can be no doubt that, in the absence of evidence to the contrary, the defendant is deemed to have been served, or is taken as having been served (presumptively served) well in advance of the default judgment having been entered against them arising from their having failed to file an acknowledgement of service within the requisite time period.

[16] That though, is nothing more than a presumption. As **rule 5.19 (1) of the CPR** itself makes clear, that deeming provision applies '*unless the contrary is shown*.' In the case at hand, the contrary has been shown and the contrary in that respect, has been entirely uncontradicted by the claimant. Raymond Therrien has provided to this court, uncontradicted affidavit evidence that the pertinent court documents were never in fact received by the defendant at any time prior to his having deponed to said affidavit evidence. See paragraph 8 of the affidavit of R. Therrien which was filed on April 15, 2013, in that regard.

[17] It is important to note that it would have been relatively easy for the claimant to have successfully disputed the defendant's evidence that they were not served with the pertinent court documents at any time prior to the default judgment having been entered by the registrar, against them. This is so because, service was purportedly effected upon them by means of prepaid registered post. As such, if that prepaid registered post had in fact been delivered, then, the date of delivery of same and the identity of the person who accepted same on behalf of the defendant, if ever same was accepted at all, could have been obtained, as information, from the post office at which said document were undoubtedly posted – that being the post office from which the claimant's attorneys obtained the postal receipt which they had submitted to the registrar, in order to obtain the default judgment which they had obtained on behalf of their client. Having failed to lead any such evidence, it is apparent to this court, that the defendant's evidence has displaced the presumption that the defendant was served a minimum of 21 days prior to the default judgment having been entered against it. As such, this court has concluded that the default judgment against the defendant was irregular and, in the interests of justice, ought to be set aside.

[18] That there were settlement negotiations entered into as between the defendant and the claimant after the claimant had allegedly sustained injuries at Fontana Pharmacy and that those settlement negotiations took place with the defendant on behalf of Fontana Pharmacy, is of no moment whatsoever, insofar as the defendant's present application is concerned. Firstly the evidence of those negotiations is, under

any circumstances, inadmissible and secondly, that has nothing whatsoever to offer this court in determining whether the defendant – Fontana Montego Bay Ltd. was served with any court documents and if so, when same was/were served.

[19] As the defendant has also applied to set aside the default judgment which has been entered against it, on the ground as set out in **rule 13.3 (1) of the CPR**, this being that – '*the court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully depending the claim*,' this court will also address its mind to that issue, if only for the purpose of providing guidance not only to the parties herein, but also, to other litigators and litigants.

[20] The pre-eminent consideration in the exercise by this court of its discretionary power to set aside a default judgment which has been regularly obtained, ought always to be, whether or not the defendant's proposed defence has, or does not have, a realistic prospect of success. That this is so, is made clear by the very wording, as quoted above, from **rule 13.3 (1) of the CPR**. Indeed, it is to be noted, that in September of 2006, the rules of court in Jamaica were amended, so as to make this pre-eminently clear. There exists caselaw both in Jamaica and England which exemplify this point. See: **Thorn plc v McDonald** – [1999] CPLR 660; **C. Braxton Moncure v Doris Delisser** – [1997] 34 JLR 423; **Blackstone's Civil Procedure** [2004], at paragraph 1.26 and **Marcia Jarrett and South East Regional Health Authority and Robert Wan and The Attorney General** – Claim No. 2006 HCV 00816.

[21] The term 'real prospect of success,' is not one requiring a definition. The meaning of that term is apparent from its own wording. What is clear from that wording, is that a distinction is to be drawn between a proposed defence which merely has a fanciful prospect of success and one which has a realistic prospect of success. Thus, a merely arguable defence would not be the equivalent of a defence with a, 'real prospect of success.' On this point, see: **Swain v Hillman** – [2001] 1 ALL ER 91; **ED and F Man Liquid Products Ltd. v Patel** – [2003] EWCA Civ. 472; **Andrew Robertson and**

**Toyojam Ltd. v Ewen Haughton** – Claim No. 2006 HCV 2311; and **Nadine Billone and Experts 2010 Company Ltd.** – [2013] JMSC Civ. 150/Claim No. 2011 HCV 1140.

[22] The burden of establishing a defence with a realistic prospect of success, rests squarely upon the defendant's shoulders. See: **Nadine Billone and Experts 2010 Company Ltd.** (*op. cit.).* Furthermore it is necessary therefore, for the defendant to lead admissible evidence before this court, as could, at least suffice to satisfy this court that they have, for the purposes of their present application, a proposed defence which has a realistic prospect of success.

[23] Exhibiting as an attachment to an affidavit, a draft defence, will not and cannot suffice to so satisfy this court. This must be so, since the mere appending of a draft defence to an affidavit is not to be taken as evidence upon which this court could properly act in considering such draft defence as being, at the very least, potentially worthy of any credit from this court. The appending of a draft defence to an affidavit, is not even the equivalent of hearsay evidence as to the contents of that draft defence, much less, a clear expression by the deponent to that affidavit, of his or her belief in the truth of the contents of that draft defence. The source of the contents of that draft defence will remain unknown, unless same has been expressly referred to by the relevant deponent in his or her affidavit evidence, to which said draft defence has been attached. As such, whilst it is the required procedure, as per **rule 13.4 (3) of the CPR**, for a draft defence to be exhibited to the affidavit evidence in support of the application, the application must be supported by evidence on affidavit. See **rule 13.4 (2) of the CPR**. That evidence must, of course, be evidence which this court can give credit to. The mere appending of a draft defence to an affidavit would not and could not achieve the objective enabling the court to give credit to the alleged facts as set out therein. Instead, such alleged facts must always be set out in the body of the affidavit which is being relied on, in support of the application to set aside. Once that has been done then it will be open to this court, to give such credit to such alleged facts, as the court believes that the same deserve.

[24] Jamaica's courts have, from time to time, made this clear. See for instance, in the judgment of Morrison J.A. in Supreme Court Civil Appeal No. 101/2012 – **B and J Equipment Rental Ltd. and Joseph Nanco** – [2013] JMCA Civ. 2, especially at paragraphs 42- 52. See on this point also: **Ramkissoon v Olds Discount Company (TCC) Ltd.** – [1961] 4 WIR 73.

[25] All that has been stated by deponent – Mr. Therrien, in respect of the defendant's proposed defence, apart from his having cursorily referred to same in paragraph 15 of his first affidavit, that reference only being for the purpose of exhibiting same to that affidavit, is as follows, in paragraph 14 of said affidavit – *'…That I am confident that the company will successfully defend the claim, as the company was not at fault in the incident and I verily believe that evidence presented by the company in relation to that incident will absolve Fontana Ltd. of any alleged liability in the claim herein*.'

[26] What though, is that, '*evidence presented by the company in relation to that incident*,' as referred to by Mr. Therrien in that affidavit of his? Certainly, he has been the only deponent to any affidavit filed on the defendant's behalf in respect of its present application. As such, he needed to have provided this court with that evidence. He has not done so and thus, equally, the defendant has not done so. The bald statement of confidence that the defendant will successfully defend the claim, as has been made by Mr. Therrien in his affidavit evidence, certainly cannot be properly taken by this court as constituting evidence of a proposed defence with a realistic prospect of success.

[27] This court though, will just briefly state that if admissible evidence had been led, via affidavit, deponing to the contents of the defendant's draft defence, then same could properly have been taken by this court, as constituting a proposed defence with a realistic prospect of success. This is so because, this is a claim for damages for negligence and/or breach of the defendant's statutory duty under the **Occupier's Liability Act**, arising from injuries which the claimant allegedly suffered while she was a 'visitor' at Fontana Pharmacy in Montego Bay.

[28] According to the claimant, as per her particulars of claim which she has certified as true, she went to Fontana Pharmacy in Montego Bay, to purchase a Christmas tree. While there, she was invited by a supervisor there – Ms. Leonie, to inspect a sample of the Christmas tree located on the top shelf in an aisle. The claimant went towards the Christmas tree and while going towards it, she hit her feet on a 'low boy' trolley, which she never saw, as a consequence of which, she sustained injuries.

[29] According to the defendant's draft defence, the claimant had, while visiting Fontana Pharmacy, entered an area there, where she ought not to have entered and in respect of which there existed signs, informing that that room, which was the store room, was to be entered only by employees. While unauthorizedly in that room, the claimant hit her foot on a cart there. The defendant contends also, in its draft defence, that the claimant's injuries were caused by her own negligence.

[30] Essentially therefore, the defendant is contending, *inter alia*, that at the material time, the place where the claimant got injured, was wrongfully and carelessly entered by her and she was a trespasser upon that portion of Fontana Pharmacy at the material time. The defendant, in its proposed draft defence, refers to the claimant having been in that store-room at the material time, as an, 'unlawful visitor' and that therefore, at the material time, the **Occupier's Liability Act** would not apply. The correct term, in law, to be used in terms of that which the defence wishes to allege though, is that at the material time, the claimant was a trespasser. The defence counsel has contended that as such, no duty of care was owed to the claimant by the defendant. The claimant's counsel has contended otherwise. Neither counsel though, provided to this court, any caselaw in support of their respective legal propositions in that respect.

[31] There is though, an abundance of caselaw on this point and suffice it to state that a duty of care is owed, at common law, by an occupier of premises, to a trespasser on a portion of that premises. It makes no difference in that regard, whether the 'trespasser' had merely trespassed on a portion of the premises, after having lawfully entered upon other portions of that premises, or whether, the trespasser had unlawfully entered that

premises from as at the point when that entry commenced. The duty of care owed to that trespasser is a duty to take reasonable care, to the extent as would be dictated as a matter both of common sense and common humanity, to exclude or warn or otherwise, within reasonable or practicable limits, in such a manner and to such an extent, as would serve to reduce or avert danger. See: **Anthony Martin, Eric Bucknor and Jamaica Public Service Company Ltd.** – [2012] JMSC Civ. 186/Claim No. 2005 HCV 2970, esp. at paragraphs 63 – 79, per K. Anderson, J. See also: **WayneAnn Holdings Ltd. t/a Superplus Food Stores and Sandra Morgan** – [2011] JMCA Civ. 44/SCCA No. 73/2009; **Manchester Beverages Ltd. and Patrick Thompson and Carlton Brown** – SCCA No. 88/94.

[32] In the case at hand, the defence wishes to contend, if permitted so to do, by this court, that it fulfilled its duty of care to comply with its duty of common humanity, to warn and avert danger in the store room of Fontana Pharmacy, Montego Bay. That is the very essence of the defendant's draft defence.

[33] Additionally, the defendant has raised in its draft defence, the issue of it not being the properly identified defendant for the purposes of this claim, as it does not trade as Fontana Pharmacy. Evidence has been provided to this court, supported by documentation, in proof of this assertion. That would, in and of itself, be sufficient to constitute a proposed defence with a realistic prospect of success, since it is apparently now at least, even accepted by the claimant, through her counsel, that the correct defendant should, in reality have been: Fontana Ltd. t/a Fontana Pharmacy.

[34] There is one final matter to be addressed and it is as regards whether the defendant has applied to this court to set aside the default judgment as soon as it was reasonably practicable after having found out that default judgment had been entered against it. Earlier judgments of this court cited above, such as the **Nadine Billone** case (*op.cit.)* make it clear that even if this court did not consider that this application was made as soon as was reasonably practicable, nonetheless, this court should set aside the default judgment if it forms the view that the defence is one which has a realistic

prospect of success. Nonetheless, for present purposes, the application to set aside was made by filing, on April 15, 2013 and according to affidavit evidence of attorney Tamiko Smith, said application was filed one month after the defendant had been notified that judgment had been entered against them, by default on their part. This court does not at all consider that one month time period in applying to set aside, as being a length of time that would even necessitate any explanation, since it is not a presumptively lengthy delay at all. In fact, it is not a lengthy delay at all. That contention of the claimant's counsel, is one therefore, which is entirely without merit.

[35] This court has also given due consideration to whether the defendant has, by evidence, given a good reason for their failure to file an acknowledgement of service and of course, they have, in that, they have given uncontradicted evidence that they never in fact were served via registered post, with the claim form and other pertinent court documents.

[36] In the circumstances, this court must and will aside the default judgment entered against the defendant and will do so on the basis that the same was irregularly entered by this court's registrar. In the circumstances, the costs of this application are awarded to the defendant, with such costs to be taxed, if not sooner agreed.

[37] This matter must, once the appropriate defendant has filed an acknowledgement of service and defence, proceed to mediation, provided that that defendant files an acknowledgement of service and a defence within 14 and 42 days respectively, of the date of this order – to be counted as 'clear days' in both respects. What this court will now do also, is order that, 'Fontana Ltd. t/a Fontana Pharmacy' be named as the defendant, in substitution for, 'Fontana Montego Bay Ltd.' The parties should be done and over rules of court provide at rule 19.3 (1), the – 'the court may add, substitute or remove a party on or without an application.'

[38] This courts orders as follows:

(i) The default judgment entered against the defendant by the registrar, is set aside, provided that there has been compliance by Fontana Ltd. t/a Fontana Pharmacy, with Order No. 3 below.

(ii) In substitution for the presently named defendant, the defendant in this claim, will be: 'Fontana Ltd. t/a Fontana Pharmacy.'

(iii) The defendant – 'Fontana Ltd. t/a Fontana Pharmacy' shall be served with the claim form and particulars of claim and all other attendant court documents and shall file its acknowledgement of service within 14 clear days of the date of service of the claim form and other attendant court documents, upon it and shall file its defence within 42 clear days of the service of said court documents upon it.

(iv) Provided that there has been compliance by the parties with Orders Nos. (ii) and (iii) above, this matter shall proceed to mediation.

(v) The costs of the defendant's application to set aside default judgment, are awarded to the defendant, with such costs to be taxed if not sooner agreed.

(vi) The defendant shall file and serve this order.

(vii) The claimant's application for leave to appeal is denied.

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**Hon. K. Anderson, J.**