[2017] **JMSC Civ 222**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011HCV01060

BETWEEN	**FLORENDA GRANT**	**CLAIMANT/ RESPONDENT**
AND	**VASTINA CAMPBELL**	**DEFENDANT/ APPLICANT**

IN CHAMBERS

Jamila Thomas instructed by Lambie-Thomas & Co. for the Claimant/Respondent

Yanique Douglas instructed by Seymour Stewart for the Defendant/Applicant

Heard: December 19, 2016, February 15, 2017 and May 4, 2017

Application to Set Aside Default Judgment, Rule 13.3 of the Civil Procedure Rules (CPR)

MASTER MASON (AG.)

[1] The Claimant Florenda Grant filed a Claim Form and Particulars of Claim on March 8, 2011 in which she sought damages for personal injuries and loss suffered as a result of being bitten by a dog allegedly owned by the Applicant Vastina Campbell, while she was walking along the Michael Manley Boulevard, Windsor Heights, St. Catherine. The Applicant filed an Acknowledgment of Service on March 31, 2011.

[2] On January 15, 2013, an Amended Particulars of Claim was filed by the Respondent in which further Particulars of Injury sustained by the Respondent for Special Damages was claimed in the sum of Sixty-Nine Thousand Five Hundred and Eighty-Four Dollars and Twenty Cents ($69,584.20).

[3] On February 6, 2012, Judgment was obtained in Default of Defence by the Respondent. The matter proceeded to Assessment of Damages on March 13, 2013 at which time Final Judgment in favour of the Respondent was entered. The Hon. Mr. Justice R. King ordered Special Damages in the sum of Four Thousand Five hundred and Seventy Dollars ($4,570.00) with interest at the rate of six percent (6%) from March 20, 2005 to June 21, 2006 and thereafter at three (3) percent to May 13, 2013. General Damages in the sum of Fifty Thousand Dollars ($50,000.00) with interest at the rate of three percent (3%) to March 16, 2011 to March 13, 2013. Costs was awarded to the Respondent in the sum of Forty Thousand Dollars ($40,000.00).

[4] The Defendant filed a Notice of Application July 6, 2015 to set aside Judgment obtained on May 13, 2013 and for a stay of execution of the said Judgment.

The Law

[5] The Court has a discretionary power to set aside a Default Judgment. This power is found in Part 13 of the CPR rule 13.3 which states that:

(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) *g*iven 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.

[6] The primary consideration in determining whether an application to Set Aside a Default Judgment regularly entered is whether the Defendant has a real prospect of successfully defending the Claim.

[7] In the case of **Merlene-Murray Brown v Dunstan Harper and Winsome Harper** [2010] JMCA App1 Phillips J. A. considered the nature of the discretion to Set Aside a Default Judgment under rule 13.3. The learned Judge cited the case of **Rahman v Rahman** for the proposition that the Judge had to consider in determining the exercise of his discretion the following:

(a) The nature of the defence

(b) The period of delay

(c) Any prejudice the Claimant was likely to suffer if the Default Judgment was Set Aside

(d) The overriding objective

[8] The learned Judged said in the **Murray-Brown v Harper** case cited above:

> *"the focus of the Court in the exercise of its discretion is to assess whether the Applicant has a real prospect of successfully defending the Claim, but the Court must also consider the matters set out in 13.3 (2) (a) and (b) of the rules."*

[9] The meaning of "real prospect of success" was further discussed in the case of **Murray-Brown v Harper** (Supra). The Court referred to paragraph 20.13 and 20.14 in Blackstone's Civil Procedure 2005 as well as the case of **International Finance v Utexafrical Sprl** [2000] CLC 1361 where it was stated that "in order for there to be a determination that there is a real prospect of success, the prospect must be better than merely arguable."

[10] The Court must look at the Claim Form as well as the draft Defence when considering matters similar to the instant case. While the Court will not embark on a mini trial, it must conduct some analysis and some evaluation of what is placed before it for consideration.

[11] In the instant case, it is noted that the Applicant at paragraph 4 of her Affidavit recalled that sometime in 2011, she got a paper for her to attend Court in Spanish Town and she took the paper to the Legal Aid office on Tower Street, but she heard nothing else about the case. I find that the Applicant displayed a lack of interest, in fact a total disregard and indifference in failing to take any further action in the matter. She ignored the case, perhaps hoping it would miraculously go away.

[12] Further, in her Defence, the Applicant stated that she was aware of an incident in April 2007 where a dog attacked the Respondent in the vicinity of her (the Applicant's) gate at Lot 24 Windsor Heights Central Village but that the injury was not serious just a scrape on the Respondent's foot.

[13] She went on to state in paragraph 6 of her Affidavit that she recalls that her son Carl Campbell told her and she verily believed that he gave the Respondent some money to visit the doctor. There is no mention in the pleadings of an incident involving a dog in 2007 as is being told by the Applicant. In an effort to support her explanation, the Applicant contradicts the issue and does this to her disadvantage. In paragraph 5 of her Affidavit she depones that she did not know of the Respondent being bitten by a dog in 2011, while in paragraph 8 of the Affidavit she describes the injury to the Respondent as involving an injury to the right thigh, and she goes on to state that the injury in 2007 was "very minor." It is the defence of the Applicant that the dog in the yard was not hers, yet her son advanced money to the Applicant to visit the doctor after she was attacked in the vicinity of the gate of Lot 24 Windsor Heights, Central Village which is his mother's residence.

[14] At paragraph 9 of her Affidavit, the Applicant states that if she had been served with the Court papers in this case, she would have defended the claim. It is very significant that she mentioned earlier that she had taken court papers to the Legal Aid Clinic and having left them there she failed to make any further enquiry.

[15] In paragraph 7 of her Affidavit the Applicant claims that she saw the court papers for the first time on June 22, 2015 and they were never served on her. However, the Applicant filed an Acknowledgment of Service on March 31, 2011 in which she gave her name as Vastina Campbell and her address as 24 Windsor Heights, Central Village, St. Catherine. I find that the Applicant's recall of the events to be disingenuous, she continues to contradict herself, which results in her evidence being fraught with discrepancies and making it totally unreliable.

[16] Evidence was presented that the Applicant was personally served by a Process Server Raymond Gauntlett on April 22, 2013 at her home address with the following documents.

(a) Notice of Assessment of Damages dated August 8, 2012.

(b) Attested copy of Judgment in Default dated February 6, 2012

(c) Claimant's lists of document filed November 20, 2012

(d) Witness Statement of Florenda Grant filed January 15, 2013

(e) Amended Particulars of Claim filed January 15, 2013

(f) Claimant's Notice of Intention to Tender into Evidence

[17] The Applicant has failed to convince me that she was not served with the various Court documents or that she was not aware of the Court proceedings. Her prospect of successfully defending the claim is extremely weak.

[18] I now consider the question of whether the Applicant is deemed the owner of the dog in question. At paragraph 5 of the Applicant's Affidavit, she denies being the owner of the dog, but admits that she feeds the dog. Section 3 of the Dogs (Liability for Injuries) Act states:

> *The occupier of any house or premises where any dog was kept, or permitted to live, or remain at the time of the injury, shall be deemed to be the owner of the dog, and shall be liable as such, unless the said occupier can prove that he was not the owner of such dog at the time of the injury complained of was committed, and that such dog was kept or permitted to live or remain in the said house or premises without his sanction or knowledge.*

[19] It is my opinion that once the Applicant continued to feed the dog, she encouraged the animal to remain at her premises. She has not provided any evidence to show that she took any preventative action or precaution to prevent the dog from coming into her premises and admits feeding the dog, a sure way of encouraging the animal to frequent and remain in the premises. I find therefore that even if she denies owning the dog, feeding the animal and allowing it to remain in her yard uninterrupted falls squarely within the context of the Act which provides:

> *"where any dog was kept or permitted to live or remain at the time of the injury [the occupier] shall be deemed to be the owner of the dog."*

[20] The Applicant has deponed at paragraph 6 of her Affidavit that her son told her that he gave the Respondent money to see a doctor after the Respondent was bitten outside the Applicant's gate. I am of the view that even the son believed that the dog in the yard, fed by his mother was theirs and as such, he felt obliged it was his duty to assist the Respondent.

[21] Another question to be answered is: Did the Applicant apply to the Court as soon as reasonably practicable after finding out Judgment was entered against her?

Default Judgment was entered on February 6, 2012. The Respondent was served personally with the pleadings on March 16, 2011. The Applicant filed a

Notice of Application to Set Aside Default Judgment on July 6, 2016, some two (2) years and two (2) months after being served with the Judgment and other court documents. In **Victor Gayle v Jamaica Citrus Growers et al** 2008HCV05707 Edwards, J held that in relation to the period of delay when the application to Set Aside the Default Judgment was made, versus the time when the Applicant sought to Set Aside the Judgment, the period of one (1) year was inordinate. In the instant case I find that the period of delay of 2 years and 2 months was too lengthy to apply to the Court to Set Aside the Judgment.

[22] There remain the question of whether a good explanation was given for failure to file an Acknowledgment of Service or a Defence I find there was none. The Applicant has not offered a good explanation for failing to act in a timely manner. The fact that she left the documents served on her with the Legal Aid Clinic and made no effort to deal with the matter indicates her disinterest and disregard in the matter. The application fails on this limb.

[23] There is no doubt that the period of delay would cause prejudice to the Respondent if the Default Judgment was set aside. The Respondent obtained Default Judgment on February 6, 2012. Final Judgment was entered in favour of the Claimant/Respondent as a result of Assessment of Damages hearing held on March 13, 2013. The Applicant was tardy in filing an Application to Set Aside the Judgment. In fact, the application was filed on May 13, 2016. The result would be that she is denied the benefit of a Judgment which she obtained some three years ago. It would be prejudicial to the Respondent to have to locate witnesses and secure their attendance in court – Witnesses who might have difficulty remembering the relevant material.

[24] Finally, the question of the Overriding Objection Rule 1.1. of the CPR is primarily concerned with ensuring that so far as is practicable that the parties are on equal footing and are not prejudiced by their financial position.

[25] In the instant case the Applicant's case is weak and without merit. The Claimant/Respondent has been successful in having judgment entered in her

favour in the Assessment Court and to date she is still unable to reap the fruits of the judgment. To allow the application in these circumstances would be contrary to the purpose of the overriding objectives.

I hereby order as follows:

1. The Application to Set Aside Default Judgment is denied.

2. The Stay of Execution of Judgment is denied.

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