[2015] JMSC Civ. 195

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012HCV02491

BETWEEN	**MERLENE JOHNSON**	**CLAIMANT/ APPLICANT**
AND	**AINSWORTH CAMPBELL**	**DEFENDANT/ RESPONDENT**

Mr. Aon Stewart instructed by Knight Junor Samuels for the Claimant/ Applicant.
Ms Raquel Dunbar instructed by Dunbar and Co. for Defendant/Respondent.

Civil Procedure - Application to set aside default judgment - Application for Extension of Time within which to file defence - Tests to be applied-Application of rule 13.2 - Application of rule 13.3 - Allegation of defect in service - Whether setting aside is as of right or discretion should be exercised - Whether reasonable prospect of successfully defending the claim - Rule 1.1 the overriding objective.

HEARD ON THE 27th May 2015 and 7th October 2015

In Chambers

Bertram-Linton, J. (Ag.)

The Application

[1] Mr. Ainsworth Campbell is asking the court, in his notice of application to set aside the default judgment entered against him based on an irregularity. He says in his affidavit that the only document served on him was the claim form which he took to his insurance company. It is in the affidavit, that supports this application that the court is also asked to consider also, that he has a reasonable prospect of successfully defending the claim**.** In this regard he puts the blame for his late response on his insurance company who he says needed to request the missing document in order to

proceed, as well he says the time allowed was insufficient to allow them to verify his policy and properly respond to the claim.

Background

[2] On the 30th October, 2009 the claimant was a pedestrian walking along the main road in Constant Spring Grove when the defendant's car collided with her. Her Claim Form was filed on May 3rd, 2012 along with Particulars of Claim which had several attachments evidencing her injuries and treatment. Miss Beverley Myers a process server employed by the claimants lawyer signed an affidavit of service to say that she personally served the court documents on the defendant, who she knew before as he was a well known attorney at law. This affidavit of service was filed on June 1, 2012. Acknowledgment of service of the claim form was filed on July26th, 2012 on behalf of the claimant which maintains that the particulars of claim were not served.

The Law

[3] Rule 13.2 of the Civil Procedure Rules (CPR) says the court **must** set aside any default judgment that as wrongfully entered. If it was found that the defendant was not served with the proper documents as required by Rule 8.1 this would amount to conduct enough to trigger the mandatory power under the rules.

Rule 8.2 is headed "Particulars of claim to be issued and served with claim form"

Thereafter the section goes on to mention a few exceptions none of which apply to our circumstances. So that the rules would require that in these circumstances, Particulars of claim should be served with the claim form to the defendant.

Rule 13.3 allows the court to set aside or vary a judgment entered in default

(1)…"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 it is reasonably practicable after finding out that judgment has been entered
b) given a good explanation for the failure to file an acknowledgement of service or a defence as the case may be."

The Submissions

[4] Ms Dunbar advanced on behalf of the defendant that he took what was served on him to his insurance company and they had to request the particulars of claim in order to ascertain the allegations against the defendant. This she concluded was an irregularity from which the claimant's case could not recover. In this regard she has cited the case of **Hugh Graham & Karen Ross v Cecil Dillon & Jimmy Walsh unreported Suit No. CLG 027/2002 delivered on 12.104**

[5] If however the court was not swayed on this point she argues that the claimant was wholly or at least partially responsible for her injuries, so the defendant had a reasonable prospect of successfully defending the claim and it was only right and just that he should be given an opportunity to do so based on the condition and considerations in Rule13.3.

[6] Mr. Stewart, for the claimant, wholly rejected any assertion that there was any irregularity in service and in any event he says the time had passed to speak to that issue since there was no application filed, consequent on the objection taken in the Acknowledgement of service. Here he referred to Rule 9.2 (1) where the defendant has the option to dispute the jurisdiction of the court if he thought there was an irregularity in service.

[7] He further maintains that the defence as set out was not arguable since the explanation given for the accident was not consistent with any damage that the car may have sustained and in fact no damage was pleaded which was inconsistent with the defendant's account of the incident.

[8] In coming to my decision in this matter I first looked at the possibility that Rule 13.2 was applicable. Beverley Myers the process server was asked to attend for cross examination. She was sworn to give true answers.

She says that she has worked on and off as a process server for over 20 years .She was responsible for putting the documents into the brown envelope which she eventually gave to the defendant at his office. She personally put the claim form and

particulars of claim along with the acknowledgement of service and the defence form into the envelope. She was familiar with the defendant, a well known attorney at law, and his office building because she had worked in that very building some years ago with another lawyer. She was sure he got all the documents because she watched as he opened the envelope and inspected them as she stood in front of him.

[9] Mr. Ainsworth Campbell the defendant was also sworn to give true answers.
He describes himself as a “near retired attorney at law”.
He could not recall the process server giving him any documents but admitted that she looked familiar to him. He knows he received a document about the claim before the court but cannot recall getting anything besides the claim form or from whom he got it. He says “I recall receiving the claim form, I don’ recall receiving any other document at that time. I took the claim form to the insurance company Advantage General, yes, took all documents received to them, no particulars of claim was among those documents.”

Discussion and Analysis

[10] Lack of service at all or lack of proper service goes to the root of any judgment obtained and in particular one obtained in default of the filing of an acknowledgment of service or the filing of a defence. I am in agreement with Mr. Stewart that the proper method of objecting to any irregularity in service would have been to contest the issue at the point of the filing of the acknowledgment of service as outlined in Rule 9.2(1) and filing an application in pursuance of that, contesting the jurisdiction of the court.

[11] In any event my assessment of Miss Myers is that she is a coherent witness with a clear and believable recollection of the events of the personal service on the defendant. She seemed quite experienced, as she says she had served process on several occasions over the last 20 years and that she had sufficient and specific knowledge of the date in question and the events as they took place. On the other hand the defendant Mr. Campbell did not recall the personal service in any detail or at all and while stating that he only got the claim form, went on to say that he took all the documents received to his insurance company. That in itself is contradictory, if he got

only one document why was there a need to take “all the documents” he received to his insurance company?
I therefore accept that on a balance of probabilities he was properly served with the documents as outlined by the process server and cannot then avail himself of the remedy in Rule 13.2. (CPR)

[12] Having disposed of that hurdle I am left to consider the issue as it relates to Rule 13.3 (CPR). The situation as it now stands then is that the defendant is seeking to avoid a default judgment which was properly entered on the basis that he has a reasonable prospect of successfully defending the claim. The Rule contemplates that the defence put forward should be looked at in an effort to determine if the criteria has been met. In **Malcolm v Metropolitan Management Transport Holdings Limited & Anor (unreported) Suit No. C. L 2002/M-225 delivered 21/5/03.**as cited by Ms. Dunbar, Mangatal, J the rule requires a defence to be better than merely arguable before a judgment can be set aside. As well in **Watson v Sewell [2013] JMCA Civ. 10** Phillips JA spoke to the subsequent amendment in 2006 which she says “… has now proclaimed that primacy is given to whether the defendant has a real prospect of successfully defending the claim.”

[13] The proposed defense admits there was a collision in which the parties were involved but denies that the defendant was negligent. His version of the events suggest that the claimant was the one who caused the collision when she began crossing the road and spun back in the direction she was coming from and so ended up in the path of the car and colliding with the left wing mirror. Mr. Stewart argues that this is a “cobbled up” defence designed to frustrate the claimant.

[14] Without conducting a mini trial I am of the view that the applicant does not have a real prospect of successfully defending the claim on the issue of liability. This is because the defendant’s account strains the imagination as to the positioning of the parties at the point they both impacted and in relation to the injuries and damages claimed. No account is given to explain this and we are left with a vague account which

is a bald assertion unsupported as to its probability based on the evidence. In order to succeed on this limb the defendant would need a good defence which is not just arguable but one that presents the court with a viable alternate version of events. That version must at least seem more than probable and more than just arguable even on the agreed facts and in many cases would also need to present the court with an explanation which if successful would exonerate the defendant. In **Sasha Gaye Saunders v Michael Green and ors [2005] HCV 2868 a** case cited by Mr. Stewart, **Sykes J** in drawing on the dicta of Lord Justice Potter in **ED&F Man Liquid Products [2003] C.P Rep 51 at para. 10** said that

"… while a mini trial was not to be conducted that did not mean that a defendant was free to make any assertion and the judge must accept it."

Lord Potter:

"However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court…particularly if contradicted by contemporary documents. If so, issues which are dependent on those facts 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] I must consider as well the factors set out in Rule 13.3(2). This aspect of the analysis suggests that the tardiness in making the application to set aside a properly obtained judgment would have a deleterious effect on the application. This consideration is an acknowledgment that the claimant has something of great value.

"This value is enhanced by the certain knowledge that a successful application to set aside judgment translates into a twenty four month to forty eight month wait for trial to take place… During that time he has to bear the cost of retaining counsel. There is the stress and anxiety of waiting for trial."**Sykes J in Sasha Gaye Dandy**

[16] In this case default judgment was entered on September 5th, 2012 but was not served until December 13th 2012. The defendant then filed his application on December 14th 2012. I cannot be said then that the defendant was tardy once it was discovered that a judgment had been entered.

[17] Regarding the delay in filing an acknowledgment and a defence, the defendant in his affidavit lays the blame on the shoulders of his insurance company who he says needed time to “verify and confirm the policy and to instruct an attorney.”The defendant being an attorney himself would be fully cognizant of the time limitations imposed by the court. In light of the fact that he suggests that there was a good defence with a reasonable prospect of success, I cannot see how filing an acknowledgment and his defence would have prejudiced his position with the insurance company until their involvement was secured. The interests of justice as always demands that we act with alacrity to obey the timetable set down by the rules in order for the fair and just disposal of cases.

[18] The overriding objective Rule1.1 must work for all parties who approach the court. It could not be expected that extensions of time would be granted regardless of the reasons for the delay. These reasons must be valid and meet the criteria outlined by the rules.

[19] Having examined all the circumstances of the case I find that the Claimant has done all that was required to secure her judgment and she should not be deprived of it. While it is never intended or desirable that defendants in this position be deprived of having cases dealt with on their merits, it is also desirable to ensure that time limits are adhered to and that good and sufficient cause is shown in order to reverse a judgment properly pursued and obtained. To set aside the default judgment in this matter would not be in keeping with the overriding objective.

The application to set aside the default judgment and for extension of time to file a defence is therefore refused.