



[2013] JMSC Civ. 139

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN CIVIL DIVISION  
CLAIM NO. 2007 HCV 05198**

<b>BETWEEN</b>	<b>GLADSTON MATTHEWS</b>	<b>CLAIMANT</b>
<b>A N D</b>	<b>ERROL CAMPBELL</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>A N D</b>	<b>CRAZY MAX DISTRIBUTORS LIMITED</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>A N D</b>	<b>WESTON TAYLOR</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>A N D</b>	<b>WESTON TAYLOR (Trading as) CRAZY MAX DISTRIBUTORS LIMITED</b>	<b>4<sup>th</sup> DEFENDANT</b>

**Jade Hollis, instructed by Jade Hollis & Co., for the Claimant**

**Ravil Golding, instructed by Ravil Golding & Co., for the 3<sup>rd</sup> Defendant**

**Heard: June 17 and July 6, 2015**

**APPLICATION TO SET ASIDE DEFAULT JUDGMENT – PRE-EMINENT CONSIDERATION IS WHETHER AFFIDAVIT EVIDENCE OF APPLICANT HAD DISCLOSED A DEFENCE WHICH HAS A REALISTIC PROSPECT OF SUCCESS**

**Anderson, K. J**

[1] This matter has come before this court at this time, following upon the 3<sup>rd</sup> defendant's application to set aside a default judgment which was entered against him, by the Supreme Court Registrar. Although oral arguments were not presented before me and this court, either in support of, or in opposition to the said application, nonetheless, this court had ordered that the said application be heard 'on paper' and

bearing in mind that the parties had each filed written submissions, there can be no doubt, that the said application was both vigorously pursued and vigorously opposed, before this court, albeit, 'on paper.'

[2] The primary issue is whether the defendant – The 3<sup>rd</sup> defendant, has a defence which has a realistic prospect of success. The 3<sup>rd</sup> defendant has deponed to evidence, clearly disclosing what his defence will be. That is the most important thing for him to have done, in seeking to have the judgment entered against him, be set aside, since caselaw from this court and the Court of Appeal, have made it clear, time and time again, that the mere appendage of a draft defence to affidavit evidence adduced on behalf of an applicant who is seeking to set aside a default judgment, is not evidence disclosing that said draft defence is one which would have a realistic prospect of success. The 3<sup>rd</sup> defendant though, has appended his draft defence to his affidavit evidence led in support of his application – this in accordance with well-established practice within this jurisdiction.

[3] The 3<sup>rd</sup> defendant undoubtedly has disclosed as his defence, allegations which have a realistic prospect of success. This is, to put it simply, that the 1<sup>st</sup> defendant who was not, at the material time, performing his driving functions, as the servant or agent of the 3<sup>rd</sup> defendant, but rather, was doing so as the servant or agent of the 2<sup>nd</sup> defendant. Additionally, the vehicle which was being driven by the 1<sup>st</sup> defendant at the material time, was not owned by the 3<sup>rd</sup> defendant. The 2<sup>nd</sup> defendant is a limited company, as the evidence has clearly disclosed. As such, even if the 3<sup>rd</sup> defendant had, at any stage, been a shareholder or director of the 2<sup>nd</sup> defendant, this would not and could not, properly result in the 3<sup>rd</sup> defendant being held liable for the negligent actions of a servant or agent of the 2<sup>nd</sup> defendant. This is so because, as clearly stated in the evidence and as is in reality, a matter of law, which the 3<sup>rd</sup> defendant has been duly advised of, the 2<sup>nd</sup> defendant is a separate legal entity from either its owners, or its directors. In any event though, it is the 3<sup>rd</sup> defendant's undisputed evidence that he was neither a shareholder nor director of the 2<sup>nd</sup> defendant. This matter concerns a motor vehicle accident between vehicles which were, at the material time, being driven

by the claimant and the 1<sup>st</sup> defendant. The claimant's vehicle was then owned by him, while the vehicle which was being driven by the 1<sup>st</sup> defendant, is owned by the 2<sup>nd</sup> defendant.

[4] The 3<sup>rd</sup> defendant has disclosed why he never entered an acknowledgement of service, or a defence within the time periods as mandated by law. He has alleged that he was never served with the requisite documents, i.e. the claim form and amended claim form. This court has found itself unable to resolve that issue of service of the requisite documentation. It is undoubtedly though, the 3<sup>rd</sup> defendant who bore the burden of proof in that respect. See: **E.D. and F Man Liquid Products Ltd. v Patel** – [2003] EWCA Civ. 472, per Potter, LJ esp. at para. 9.

[5] This court though, does not need to resolve that issue, in order to adjudicate on the 3<sup>rd</sup> defendant's application to set aside default judgment, in the 3<sup>rd</sup> defendant's favour. Whilst the burden is on the applicant to show a good reason for having failed to file his acknowledgement of service and defence within the time periods mandated for same, by law, even if the 3<sup>rd</sup> defendant has failed to meet this burden, this does not mean that his application cannot succeed. The pre-eminent consideration for this court, in determining whether to set aside a default judgment, is whether the proposed defence is one which has a realistic prospect of success. See: **Rule 13.3 (1) of the Civil Procedure Rules (CPR) and Marcia Jarrett and South-East Regional Health Authority and Robert Wan and The Attorney General** – Claim No. 2006 HCV 00816; and **C. Braxton Moncure v. Doris Delisser** – [1997] 34 J.L.R. 423; and **Blackstone's Civil Procedure** [2004], at paragraph 1.26; and **Thorn plc v. McDonald** – [1997] (CPLR 660; and **Nadine Billone and Experts 2010 Company Ltd.** – Claim No 2011 HCV 1140/2013/JMSC Civ. 150.

[6] The 3<sup>rd</sup> defendant has satisfied this court that he applied to this court as soon as was reasonably practicable after having found out that judgment was entered against him. The 3<sup>rd</sup> defendant has, in that respect, deponed to having been notified, on December 15, 2011, of the order for seizure and sale made by this court against him

and to having then been served with legal process in this matter. The 3<sup>rd</sup> defendant's application to set aside was filed five (5) days later, on December 20, 2011.

[7] In the circumstances, this court is obliged to and does, set aside the default judgment entered against the 3<sup>rd</sup> defendant. The 3<sup>rd</sup> defendant will be ordered to file an acknowledgement of service and his defence within time periods that will be stipulated within this order. This matter will proceed to mediation and it will only be if mediation is unsuccessful, that a case management conference must then be held.

### **Orders**

1. The default judgment entered against the 3<sup>rd</sup> defendant on June 10 is set aside, subject to there being compliance by the 3<sup>rd</sup> defendant, with Order No. 3 below.
2. This matter shall proceed to mediation and mediation shall be conducted, before this matter returns to this court for further consideration.
3. The 3<sup>rd</sup> defendant shall file and serve his acknowledgment of service and defence, by or before July 17, 2015.
4. The costs of and pertaining to the 3<sup>rd</sup> defendant's application to set aside default judgment shall be the 3<sup>rd</sup> defendant's costs in any event and shall, if not agreed, be taxed by the Registrar.
5. The 3<sup>rd</sup> defendant shall file and serve this order.

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