[2016] JMSC Civ. 194

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2016 HCV 12816

BETWEEN	**KAREY HUGH POWELL**	**CLAIMANT**
A N D	**PHILBERT MULLINGS**	**DEFENDANT**

Ms. Janeve Williams for the Claimant.

Mrs. Pauline Brown Rose for the Defendant

HEARD: November 4, 2016

CORAM: Wint-Blair, J. (Ag)

[1] This decision concerns

1. An application for an extension of time and in the alternative;
2. An application to set aside default judgment.

I have decided the application to set aside default judgment first as it will be determinative of the application at number one.

[3] I have considered the extensive written and oral submissions of both learned counsel and am grateful for their industry which has been invaluable.

[4] Counsel for the claimant has not responded in her written submissions to the application for an extension of time relying instead on the outcome of the application for setting aside default judgment as determinative of the issues raised by opposing counsel in both applications.

[5] The CPR by Rule 13.3(2) sets out the test for setting aside a regularly obtained default judgment. This test is whether the defendant has a real prospect of

successfully defending the claim. In turn, a defendant who seeks to have a regularly obtained judgment set aside has to persuade the court by evidence:

a. That he can successfully defend the claim on the facts and the applicable law, setting out his case;
b. That there is a good explanation for the failure to file a response to the claim (acknowledgment of service/defence).
c. That the application was made as soon as was reasonably practicable.

[6] The facts of the instant case bear some resemblance to those in the case of **Bar John Industrial Supplies Ltd. v Honey Bee Fruit Juice Ltd**., **[2001]** JMCA Civ. 7,I n which Hibbert , J.A. held at paragraph 19.

> *"Rule 13.4 sets out the procedure to be followed for the making of an application to set aside a default judgment. It states: 13.3 (1). An application may be made by any person who is directly affected by the entry of the judgment; (2) The application must be supported by evidence on affidavit; (3) The affidavit must exhibit a draft of the proposed defence. Mr. Cowan's affidavit filed in support of the application to set aside the judgment exhibited no draft of the proposed defence and accordingly did not comply with the provisions of rule 13.4 (3) of the CPR, Rule 13.3 (1) of the CPR provides that a court may set aside a default judgment if the defendant has a real prospect of successfully defending the claim. This court finds that there is nothing contained in Mr. Cowan's affidavit from which the learned master could be so satisfied. Neither could the learned master examine the defence which was filed out of time for this purpose."*

[7] Having examined the affidavit for compliance with the Rules, the court then goes on to decide what weight to give to the issues raised in the evidence and to answer the questions set out below:

- The nature of the defence. Is there a real prospect of successfully defending the claim? It is well settled that this means that the defence must therefore be more than arguable: **Alpine Bulk Transport Co. Inc v Saudi Eagle Shipping Co. Inc.** [1986] 2 Lloyd's Rep 22 and also have real rather than a fanciful prospect of success: **Swain v Hillman and another** [2001] 1 All E.R. 91. [Rule 13.3 (1)].

- The period of delay- was the application filed as soon as was reasonably practicable? An accounting for time is necessary. On the evidence and it is in the affidavit that this explanation ought to be found. [Rule 13.3(2) (a)].

- Has the defendant given a good explanation for the failure to file an acknowledgment of service or defence? The word "good" tell us that not just any explanation will meet the requirements of the rule. The explanation should be one which will persuade the court that it ought to be accepted to do justice to the case presented on the evidence. [Rule 13.3(2) (b)].

- Will there be any prejudice suffered by the claimant if the default judgment was set aside. A default judgment being "something of great value": per Sykes, J, in **Sasha Gaye Saunders v Michael Green et al** 2005HCV 2868 at paragraph 24.

- The overriding objective. What is the impact of the application of the overriding objective to the application before the court?

In the instant case, the claim was filed on May 29, 2015. An acknowledgment of service was filed on July 29, 2015 which indicated that the claim was served on July 13, 2015.

[8] On April 20. 2016, the notice of application for court orders seeking to set aside the judgment entered on October 22, 2015, was filed with a supporting affidavit from the defendant Philbert Mullings. The following orders were sought:

1. That the time within which to file the defence behalf [sic] of the defendant be extended.
2. That the Defence and Counterclaim filed on March 7' 2016 be allowed to stand.
3. That costs to be [sic] costs in the Claim
4. That there be such further or other relief as this Honourable Court deems just.

[9] On June 29, 2016, Mrs. Brown Rose filed an amended notice of application for court orders requesting an order for an extension of time to file defence and that the defence and counterclaim filed out of time on March 7, 2016 be allowed to stand. In the alternative, that the default judgment entered on 22nd October 2015 be set aside.

[10] The affidavit of the defendant Philbert Mullings filed on April 20, 2016 was relied upon. It is exhibits as "to PM1" the defence filed on March 7, 2016. This was not a draft defence but a defence which pre-dated this application and which was filed out of time.

[11] There is no dispute that the judgment obtained by the claimant in default was regularly and properly entered. There was no draft defence exhibited to the affidavit of the defendant Mr. Mullings, filed on the amended notice of application for court orders.

[12] It is not for counsel appearing in the matter to submit that the applicant has complied with the requirements of Rule 13.3. It is the affidavit which must be compliant not the submissions. This was laid down by Hibbert, J.A. at paragraph 18:

> *"Mr. Cowan, in his skeleton arguments, submitted that the appellant in applying to set aside the judgment in default, had complied with the requirements of the rule 13.3 of the CPR by showing that the application was made as soon as was*

reasonably practicable after finding out that judgment was entered and giving a good explanation for the failure to file an acknowledgment of service. ***Evidence to satisfy these requirements could only come from the affidavit filed in support of the application****. The affidavit of Lancelot Cowan failed to address these issues. Not surprisingly therefore, these contentions were not pursued before us."(emphasis mine.)*

[13] The facts of the instant case bear some resemblance to those in the case of **Bar John Industrial Supplies Ltd v Honey Bee Fruit Juice Ltd**, [2011] JMCA Civ. 7. In which Hibbert, J.A. (Ag) held at paragraph 19.

> *"Rule 13.4 sets out the procedure to be followed for the making of an application to set aside a default judgment. It states: 13.3(1). An application may be made by any person who is directly affected by the entry of the judgment; (2)The application must be supported by evidence on affidavit; (3)The affidavit must exhibit a draft of the proposed defence. Mr. Cowan's affidavit filed in support of the application to set aside the judgment exhibited no draft of the proposed defence and accordingly did not comply with the provisions of rule 13.4(3) of the CPR Rule 13.3(1) of the CPR provides that a court may set aside a default judgment if the defendant has a real prospect of successfully defending the claim. This court finds that there is nothing contained in Mr. Cowan's affidavit from which the learned master could be so satisfied. Neither could the learned master examine the defence which was filed out of time for this purpose."*

[14] With regard to Rule 13.4 (3), the dictum of Hibbert, J.A. in **Bar John** regarding the filing of a draft defence has to be viewed in context. In that case, no acknowledgment of service had been filed, neither had a defence been filed within 14 days. The defence filed was out of time and the affidavit of the defendant failed to address the issues of whether the application had been made

as soon as reasonably practicable as well as the giving of a good explanation for the failure to file the acknowledgment of service. Therefore there was nothing upon which the defendant could successfully advance the merits of the case and the application was refused.

[15] In my view, the case of Bar John may be interpreted to mean that if no draft defence is filed it may not be fatal to the application. The court should also examine the affidavit of the defendant to determine whether it contains a real prospect of success and satisfies Rule 13.3.

The test: Is there a real prospect of success

[16] The defendant's affidavit sets out at paragraphs 12 and 13 the circumstances in which he found himself in a collision with the claimant. The defendant averred that he was driving his motor truck loaded with goods weighing 8 to 10 tons. He was proceeding uphill in the passing lane on a two-lane stretch of road on Melrose Hill Bypass towards Mandeville. On that stretch of road, vehicles proceeding uphill are designated two lanes and vehicles proceeding downhill one lane. In the vicinity of "Yam Hill" whilst in the passing lane, the claimant driving Honda Civic motor car crossed into his lane at a high rate of speed negligently causing a collision with his truck.

Mrs. Brown Rose submitted that in the case of **International Finance Corporation v Utexara [2001] CLC 1361** Moore-Bick, J held that:

> *"A person who holds a regular judgment, even a default judgment, has something of value and in order to avoid injustice he should not be deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice to set the judgment aside."*

[17] I consider the instant case to be an arguable case with a good defence, it has a real prospect of success. It is a mixed question of fact and law. The provisions of the Road Traffic Act and the claimant's position raise questions of fact to be found by the trial judge.

Was there a good explanation for the failure to file a defence?

[18] The defendant attributes fault to his attorneys for not defending the matter on his behalf. They filed an acknowledgment of service evicing an intention to defend the action but went no further. The defendant took no steps until March 1, 2016 when he "discovered" that no defence and counterclaim had been filed though he had given those instructions. His only explanation was that his attorneys did not defend the action as he had intended. As has been previously stated, the explanation must be a good one. Given the state of the law, the inadvertence of counsel is attributable to the defendant, I rely upon the dictum of Sykes, J in **Sasha-Gaye Saunders v Michael Green and Ors. 2005 HCV 2868** where he said:

> *"In the absence of some explanation for the failure to file a defence or acknowledgment of service, the prospect of succeeding in having the judgment set aside should diminish."*

[19] There is authority for the proposition advanced and relied upon by Counsel Ms. Williams that the fault of counsel is not a reason for delay. In **B & J Equipment Rental Limited v Joseph Nanco SCCA 101/2012**, McDonald-Bishop, J (as she then was) said:

> *"The conduct of counsel for the second defendant cannot be used so as to ensure to the benefit of the second defendant and to cause detriment to the claimant who has prosecuted the claim to a final judgment. If counsel failed to carry out his duties in the interest of the second defendant, then there are other options available to the second defendant to remedy that situation That is a matter between the second defendant and its counsel with which the case for the claimant ought not to be concerned."*

[20] Mrs. Brown Rose argued that the defendant had assumed that the matter would be defended as he had instructed and that the filing of the acknowledgment of

service is proof of this. She relied upon the case of **Thorn plc v McDonald [1999] CPLR 660** for the proposition that the absence of a good explanation does not in and of itself dispose of the matter, it is merely a factor to be taken into account.

[21] On Tuesday, March 1, 2016, as no defence and counterclaim had been filed the defendant set about changing attorneys. He put his new counsel, Mrs. Brown Rose in the position to file a Notice of Change of Attorney on Monday, March 7, 2016. On that same day, Mrs. Brown Rose filed a defence and counterclaim. The judgment in default was entered on October 22, 2015. The first application to deal with the substantive issue was filed on April 20, 2016. There was some six months of delay then, between the entry of the judgment and the first application to extend time.

[22] The relevant chronology for ease of reference is as follows:

(1) The claim: filed on May 29, 2015.
(2) Claim served: July 13, 2015;
(3) An acknowledgment of Service filed: on July 29, 2015;
(4) The defence and counterclaim filed: on March, 7, 2016;
(5) The Notice of Change of Attorney filed: on March 7, 2016;
(6) The Interlocutory Judgment in default of defence filed: October 22, 2015;
(7) Notice of Application for court orders filed requesting an extension to time to file defence filed: April 20, 2016;
(8) Judgment served by facsimile filed: August 5, 2016;
(9) Assessment of damages hearing: June 29, 2016;
(10) Amended Notice of Application for court orders requesting default judgment be set aside filed: June 29, 2016;

[23] Mrs. Brown Rose has not indicated in her submissions, the reasons for the eight month delay between the filing of the defence and the date of the filing of the application to set aside. The defendant's affidavit does not explain this delay and

there is no affidavit from counsel, Mrs. Brown Rose. This was not lost on Counsel Ms. Williams who took issue with the period of delay.

[24] It was submitted by Ms. Williams that it was on the date scheduled for the assessment of damages hearing that the amended notice of application for court orders requesting that the default judgment be set aside had been filed. I interpret that to mean that, despite having changed attorney; and filed a defence and counter claim on March 7, 2016 and an application on April 20, 2016 to extend time, the defendant did not take steps to ascertain whether or not a judgment had been entered against him.

[25] Ms. Williams also argued that the defendant cannot fault his attorneys who, though their inadvertence failed to file the defence within time, or to ascertain whether judgment had been entered in the matter, as this is attributable to him.
I hold that there is no good explanation before the court for the delay.

Potential prejudice to the Claimant

[26] This head has to be weighed against the existence of a real prospect of success. Ms. Williams submits that the payment of costs to the claimant will not satisfy the issue of prejudice. This is exacerbated by the fact that the amended application for court orders was filed on the same day as the hearing for assessment of damages. Damages have not yet been assessed. Any prejudice to the claimant has not been established and may outweigh the prejudice to the defendant if he is shut out of the process

The overriding objective

[24] I rely upon the provisions of the Civil Procedure Rules at part 1 and the principles set out in **Blackstone's Civil Procedure** paragraph 1.26 which states:

> *"The main concept in the overriding objective is that the primary concern of the court is to do justice. Shutting a litigant out though some technical breach of the rules will not often be consistent with*

this, because the primary purpose of the civil courts is to decide cases on their merits not reject them for procedural default."

This is a re-statement of the principle as laid down by Lord Atkin in **Evans v Bartlam [1937] 2 All E.R. 646 at 650:**

"The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by failure to follow any of the rules of procedure."

Having weighed all the factors presented and considered the submissions and authorities filed by counsel, I am prepared to apply the overriding objective to the instant case as the delay is not inordinate, in order to have the matter heard on its merits.

Orders

1. The default judgment entered on October 22, 2015 in Judgment Binder No. 765 Folio 409 in favour of the claimant is hereby set aside.
2. The application to extend time for filing of defence is also granted. The defence filed on March 7, 2016 stands as filed.
3. Case Management Conference hearing date to be set.
4. Costs to the claimant to be taxed if not agreed.
5. Liberty to apply.
6. Formal order to be prepared, filed and served by counsel for the defendant.