[2023] JMSC Civ. 243

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020CV02575

BETWEEN	**MARLENE FRANCECO**	**CLAIMANT**
AND	**WESLEY MIGNOTT**	**DEFENDANT**

IN CHAMBERS

Ms Racquel Dunbar instructed by Dunbar & Co. appearing for the Defendant/Applicant

Mr Devon G. Deslandes appearing for the Claimant/Respondent

Heard: November 9th, 2023 and December 12th, 2023

Civil Procedure and Practice – Application to set aside Default Judgment – Whether the Applicant has a realistic prospect of success – Conditions to be satisfied for setting aside a Default Judgment – CPR, 13.3 (1); 13.3 (2) – Delay – Prejudice

T. HUTCHINSON SHELLY, J

INTRODUCTION

[1] This is an application to set aside default judgment which was filed by the Defendant on the 7th of December 2021. The application seeks the following orders:

1. *The Judgment in Default entered against the Defendant be set aside;*
2. *That the Defendant be permitted to file his Defence out of Time;*
3. *That the Defendant be permitted to let stand his Defence filed on October 7, 2020 and served on October 12, 2020;*

4. *That the Defendant be permitted to let stand his Acknowledgement of Service of Claim Form filed on October 7, 2020 and served on October 12, 2020;*
5. *That the Defendant be granted any other relief as this Honourable Court deems just.*

[2] The Application is supported by an affidavit sworn to by Mr Mignott to which a draft defence was appended. In this affidavit and draft defence, Mr Mignott denies that he was negligent and attributes the cause of the accident to a mechanical defect and/or contributory negligence on the part of the Claimant. Although Mr Mignott had sought to raise the issue of non-service in his affidavit of merit, Ms Dunbar advised the Court that this matter would be proceeding as a **13.3** application.

[3] The application is opposed by the Claimant who raised questions as to the strength of the defences raised and whether the Defendant ought to be rewarded for his delay in acting, having been personally served.

ISSUES

[4] The Court has to decide the following issues:

1. Whether the Applicant has a real prospect of successfully defending the claim to justify the setting aside of the judgment in default?

2. Whether the Applicant applied to the Court as soon as is reasonably practicable after finding out that judgment has been entered?

3. Whether the Applicant has given a good explanation for the failure to file an acknowledgement of service?

[5] I have carefully reviewed the application, the issues raised, the evidence and extensive submissions which have been made in respect of same and I have decided to grant the application to set aside default judgment on the terms and for the reasons outlined below.

Application to set aside default judgment – Relevant legal principles

[6] Rule **13. 3** of the CPR grants the court the power to set aside a default judgment and provides as follows:

> *(1) The court may set aside or vary a judgement 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 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.*
> *(3) Where this rule gives the court power to set aside a judgment, the court may instead vary it."*

[7] The general principle regarding the setting aside of default judgments is encapsulated in the seminal case of **Evans v Bartlam** [1937] A.C. 473 where Lord Atkin stated that:

> "*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 only been obtained by a failure to follow any of the rules of procedure.*"

[8] This principle has been examined and applied in several decisions from our Courts which have been cited and relied on by Counsel for the respective parties. One of the more notable decisions is the case of **Flexnon Limited v Constantine Michell and Others** [2015] JMCA App 55, where the relevant test in respect of a **13.3** application was considered. In that decision, McDonald-Bishop JA stated at paragraph 15 as follows:

> *"the primary test for setting aside a default judgment regularly obtained is whether the defendant has a real prospect of successfully defending the claim. The defence must be more than arguable to be such as to show a real prospect of success."*

[9] Paragraph 16 of the judgment is also instructive where McDonald-Bishop JA further stated:

> *"Based on the provisions of the CPR and the relevant case law, the considerations for the court, before setting aside a judgment regularly obtained, should involve an assessment of the nature and quality of the defence; the period of delay between the judgment and the application made to set it aside; the reasons for the defendants' failure to comply with the provisions of the rules as to the filing of a defence or an acknowledgement of service, as the case may be, and the overriding objective which would necessitate a consideration as to any prejudice the claimant is likely to suffer if the default judgment is set aside."*

WHETHER THERE IS A REAL PROSPECT OF SUCCESSFULLY DEFENDING THE CLAIM – RULE 13.3 (1) CPR

[10] The first limb of rule 13.3 is often described as being of paramount consideration to the Court. The test is the same as in an application for summary judgment[1], which states that the defendant must have a real prospect of successfully defending the claim rather than a fanciful one. In determining whether the test has been satisfied, there must be a defence on the merits to the requisite standard. The case law also makes it clear that the evidence presented should reveal more than a merely arguable case.

[11] Useful guidance is also found in the case of **Russell Holdings Limited v L & W Enterprises Inc. and ADS Global Limited** [2016] JMCA Civ. 39 where the Learned Judge stated:

> *"[83] A defendant who has a real prospect of successfully defending the claim may still be shut out of litigation if the factors in rule **13.3(2) (a)** and **(b)** are considered against his favour and if the likely prejudice to the respondent is so great that, in keeping with the overriding objective, the court forms the view that its discretion should not be exercised in the applicant's favour. If a judge in hearing an application to set aside a default judgment regularly obtained considers that the defence is without merit and has no real prospect of success, then that's the end of the matter. If it is considered that there is a good defence on the merits with a real prospect of success, the judge should then consider the other factors such as any explanation for not filing an acknowledgement of service or defence as the case may be, the time it took the defendant to apply to set the judgment aside, any explanation for that delay, any possible prejudice to the claimant and the overriding objective.*

[12] It is settled law that in determining whether there was a real prospect of success, the court must give consideration to the claim, the nature of the defence, issues of the case and whether there is a good defence on the merits with a realistic prospect of success.

[13] In the case at bar, while Ms Franceco accepted that she had been seated at the time that the Defendant's truck made contact with her and dragged her

[1] **Swain v Hillman and Another** [2001] 1 All ER 91

along the roadway, she denied that she had contributed to what had occurred. In her witness statement which was referred to by Counsel for the Defendant, Ms Franceco stated that she had been sitting in a chair on the edge of the roadway, 6 inches from the sidewalk and four feet in front of the truck. Her back was to the road and the Defendant's vehicle was to her right.

[14] She denied hearing the vehicle start and only realised what was happening based on utterances from others which caused her to look in that direction. She realised at this point that the vehicle was bearing down on her at high speed. The vehicle then collided with her chair and dragged her along the roadway. She attributed the collision to the Defendant's own negligence in moving his truck which had been parked nearby and also relied on the doctrine of res ipsa loquitur in explaining how the collision occurred.

[15] The Applicant, in his affidavit in support and draft defence made it clear that the defence provided hung on two (2) tenets. The first was that the collision had been solely caused by or contributed to by a mechanical difficulty. Mr Mignott also indicated that in the alternative, the accident was caused or contributed to by the Claimant's own negligence as she had been sitting on the roadway on the relevant time.

[16] In my examination of this issue, I am mindful of the fact that rule **10.5** of the CPR imposes a duty on the defendant to set out in the defence all the facts on which he intends to rely to dispute the claim. For the purpose of this application, the affidavit of merit should make reference to the defence on which the applicant relies. After careful review of the Affidavit evidence and Draft Defence, it is evident that while the Applicant contends that there was a mechanical difficulty, both documents are completely silent as to the nature of this difficulty. Although he acknowledged that he was the person driving the vehicle at the relevant time Mr Mignott makes no mention of whether it was a challenge with his brakes or some other issue over which he had no control.

[17] In circumstances where the Defendant has made this assertion, which if accepted could provide an absolute defence, I found it curious that there was no other information in his pleadings or evidence to support same. It is his

contention that the default judgment should be set aside because he is likely to succeed at trial but the evidence provided by him falls woefully short of the standard required and can at best only be described as arguable. Having arrived at this conclusion, I am unable to agree that the Defendant would have a real prospect of success on this proposed defence.

[18] This does not bring the matter to an end however, as the Defendant has also asserted that he would have a real prospect of success on the issue of the division of liability based on the alleged contributory negligence by the Claimant. In considering this defence, I took careful note of the Ms Franceco's statement which contained the evidence on which she had intended to rely for the purpose of the assessment hearing. In her statement, Ms Franceco indicates that she had been sitting on the edge of the roadway. It is evident that she does not mean that she was on the sidewalk or in a yard as she outlined the distance she had been seated from the sidewalk and makes no mention of being in a yard. She acknowledged that she had her back to the roadway and asserted that the road was wide and two trucks could comfortably pass in the space that was there.

[19] In my assessment of this evidence, I carefully considered the defendant's assertion that the Claimant was seated on the roadway. Ms Franceco does not seem to dismiss this but asserts that the truck was four feet away and the engine was off. It does not appear that she was monitoring the truck as her back was to it and it was calls from other individuals that made her aware something was happening. In these circumstances, I am satisfied on a balance of probability that the evidence raises a triable issue on which he could succeed as opposed to one which is merely fanciful.

WHETHER THE DEFENDANT APPLIED TO THE COURT AS SOON AS REASONABLY PRACTICABLE AFTER FINDING OUT THAT JUDGMENT HAS BEEN ENTERED

[20] Although the Defendant has satisfied the Court that this application should be set aside under Rule **13.3(1)**, it was considered prudent nonetheless to consider the provisions of **13.3(2)**. The issue of whether the application had

been made to the Court as soon as practicable has been extensively considered in a number of authorities from this jurisdiction**.**

[21] In the **Flexnon** decision (supra), McDonald Bishop JA opined:

> [28] "**While it is accepted that the primary consideration is whether there is a real prospect of the defence succeeding, that is not the sole consideration and neither is it determinative of the question whether a default judgment should be set aside. The relevant conditions specified in rule 13.3(2) must be considered and such weight accorded to each as a judge would deem fit in the circumstances of each case, whilst bearing in mind the need to give effect to the overriding objective." (**emphasis added)

[22] In addressing this issue, Ms Dunbar describes the application as premature as she asserts that it was filed in December 2021 whereas the Defendant was not served with the default judgment until January 2022. Mr Deslandes did not take issue with this and acknowledged that the timing of the application would certainly not be considered egregious and decided cases have shown that applications made far later in the day have been ruled as promptly made.

[23] In reviewing this limb of the requirements, I note that although Default Judgment had been requested from August 2020, it was not entered until the 4th of November 2021. The Defendant's application was filed just over a month later on the 7th of December 2021. It is evident that the application was made promptly and the Defendant has satisfied this requirement as well.

WHETHER THERE IS A GOOD REASON FOR FAILURE TO FILE AN ACKNOWLEDGMENT OF SERVICE OR A DEFENCE

[24] In relation to this issue, it is clear that the Applicant had been personally served with the documents in July/August 2020. By his account, he took them to his insurers and was informed by them that a Legal Representative would be instructed to address the matter and left the matter with them. He was subsequently contacted by an Attorney in September 2020 after which discussions were had and communication exchanged with Counsel for the Claimant.

[25] Ms Dunbar acknowledged that the acknowledgment of service would have been filed out of time but asked the Court to consider the fact that the Defence would have been filed within the time specified by the rules as Rule **3.5** of the CPR states that time does not run during the long vacation time for the filing and service of a statement of case. In those circumstances, time would have started running from the 16th of September and the Defence filed on October 7th 2020 would have been in time. Counsel relied on **Sasha-Gaye Saunders v Michael Green and others 2005HCV02868** wherein Sykes J (as he then was) stated that even if a Defendant deliberately allowed time to pass, if his defence has a real prospect of success then he should succeed.

[26] I have considered the Defendant's explanation and the assertion that he had done all that he could and should not be penalised for the delay which was attributed to his Insurers/Attorneys. While I accept that the Defence may have been filed in time, it was nonetheless still incumbent on the Defendant to fully comply with the timelines established in the rules and the Claimant was well within her rights to have requested default judgment after the 14-day period had passed.

[27] In light of the foregoing and the fact that the Claimant had done enough to bring the matter to his attention, I was unable to find that he had provided a good explanation for this failure. In any event, the absence of a good explanation in and of itself would not have been sufficient to override the Court's earlier finding that he should be allowed to contest the matter having satisfied the requirements of Rule **13.3 (1)** of the CPR.

PREJUDICE

[28] In **Flexnon Limited** *supra*, the Court affirmed that prejudice to a party must be considered in determining whether a regularly entered default judgment is to be set aside. Undoubtedly, the Claimant would be prejudiced if the court is to grant the orders sought by the Applicant and set aside the default judgment. The financial and emotional prejudice likely to be suffered have been outlined by Mr Deslandes and I do not propose to re-state them here. The Court is tasked with balancing this against any equal or greater prejudice which may be caused to

the Applicant if he is to be barred from proceeding with his defence and the claim not allowed to be tried on its merits. In respect of any prejudice which may be suffered by the Applicant, although his affidavit suffers from a paucity of detail on this point, I note that he would be faced with having to comply with an award of damages against him if the judgment is allowed to stand in circumstances where there is a real prospect of success on the point of contributory negligence.

[29] The Court accepts that the discretionary power to be exercised in an application of this nature is not to punish a party for incompetence or technical breach without having a hearing on the merits. However**,** due regard must be had to the fact that the Claimant has a judgment in his hand. In **International Finance Corporation v. Utexafrica S.P.R.L.** [2001] EWHC 508 (Comm), Moore-Bick, J. underscored the importance that must be attached to all judgments. The learned Judge stated as follows: -

> *"8. …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."*

[30] On a careful assessment of the foregoing findings, I am satisfied that greater prejudice would be done to the Defendant if this application to set aside judgment is refused. I believe that the interest of the Claimant can be addressed with the identification of an early trial date in the fast track Court and the setting of strict timelines for the filing of documents required for trial accompanied by sanctions. The Claimant would also be entitled to an award of costs for the delay and losses occasioned by the Defendant herein.

CONCLUSION

[31] As such, for the reasons which have been outlined above, I am satisfied that this is an appropriate case for the default judgment to be set aside. Accordingly, the following orders are made:

1. The application to set aside default judgment is granted.

2. The Defendant is to file and serve a defence specific to contributory negligence on or before the 12th of January 2024.

3. A case management conference is scheduled for the 29th of May, 2024 at 2:00 p.m. for 30 minutes on the Zoom platform.

4. The matter is scheduled for trial before a Judge alone in Open Court for two (2) days on the 25th and 26th of November 2024 commencing at 10:00 a.m. on each day.

5. Costs of this application are awarded to the Claimant to be taxed if not agreed.

6. Defendant's Attorneys to prepare, file and serve the Formal Order herein.