[2024] **JMSC Civ 133**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2023CV03419

BETWEEN	**ALDWAYNE BROADBELL**	**CLAIMANT**
AND	**DONALD FARQUAHARSON**	**DEFENDANT**

IN CHAMBERS

Ms. Britney-Lee Johnson with Gaurika Makhijani instructed by Makhijani & Johnson, Attorneys-at-Law for the Claimant/Respondent

Ms. Amanda Montaque instructed by Myers Fletcher & Gordon for the Defendant/Applicant

October 23 and 25 and November 1, 2024

Civil Practice and Procedure – Application to Set Aside Default Judgment – CPR Rule 13.3 – Whether or not the Defendants have a Defence with a Real Prospect of Success

COR: STAPLE J

BACKGROUND

[1] The Claimant and the Defendant are locked in an intense battle over whether or not to set aside a default judgment granted to the Claimant.

[2] The Claimant had filed the instant claim on the 31st of October 2023. The Defendant hired counsel and filed an acknowledgment of service on the 13th November 2023. He acknowledged being served on the 8th November 2023.

[3] What followed was a delay of some 5 months before the Defendant did anything further.

[4] In the interim, the Claimant requested judgment in default of defence on the 4th January 2024 and the judgment was entered on the 7th May 2024.

[5] The Court sent Notice of the entry of the judgment in default, the date for assessment of damages and the case management conference for assessment of damages to the parties.

[6] On the 27th May 2024, the Defendant applied to set aside the judgment in default. The parties filed their respective affidavits and submissions along the way culminating in arguments on the 23rd and 25th October 2024. The Defendant also secured the services of new counsel in the period between the filing of the application to set aside default judgment and the final date of oral arguments.

[7] The Court is now tasked with determining whether or not the judgment in default validly entered should be set aside.

THE ISSUES

[8] The Parties have rightly identified the issues to be resolved as follows:

(i) Whether or not the Defendant has a defence with a real prospect of success;

(ii) Whether or not the Defendant has applied to the Court as soon as reasonably practicable after finding out that the judgment was entered; and

(iii) Whether the Defendant has given a good explanation for the failure to file a defence within the time allowed.

[9] The Defendant has not challenged that he was validly served with the Claim Form and Particulars of Claim as well as other supporting documents. Accordingly, he is

seeking to move the Court to exercise its discretion under rule 13.3 to set aside the Default Judgment.

[10] It is important to note that the key question to ask is whether or not the Defendant has a defence with a real prospect of success.

[11] However, the Court must also consider, in accordance with rules 13.3(2)(a) and (b), whether or not the Defendants applied to set aside the judgment as soon as reasonably practicable after receiving notice of the entry of the judgment and whether or not the Defendants have given a good explanation for failing to file a defence (in this case) within the time allowed by the rules[1].

[12] The Court finds that the application was made as soon as reasonably practicable after the Defendant received notice of the entry of the judgment in default. The Court finds that the Claimant applied within 3 weeks of receiving notice of the entry of the judgment in default. It was not argued that this was not "as soon as reasonably practicable" in any event.

[13] The main contest between the parties was whether or not the Defendant had a good explanation for failing to file his defence within the time allowed and whether or not the Defendant had a defence with a real prospect of success.

The Explanation for the Delay – Was it a "good explanation"?

[14] It is reasonable to say that what amounts to a good explanation for anything is always a matter of context and is heavily fact dependent. It stands to reason then that much turns on the evidence put before the Court as to why something was not done.

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[1] See *AG of Jamaica v McKay* [2012] JMCA App 1 at para 21

[15] The Defendant was served on the 8th November 2023. His defence should therefore have been filed no later than December 21 2023. December 21, 2023 was a Thursday and not a public holiday and so the Registry's normal operating hours and conditions would apply.

[16] However, nothing happened. Indeed the Claimant waited until the new year to request their judgment in default and the judgment in default was not entered until May 7, 2024. Therefore the Defendant would have had plenty of time within which to firstly file their defence and then to file an application for extension of time to file defence if they missed this first deadline.

[17] The evidence from the Defendant as to what led to him not filing the Defence in time amounts to him placing full blame on his former attorneys-at-law and his former attorneys-at-law accepting that blame. The sequence of events were found at paragraph 10 of his affidavit filed on the 27th May 2024 and a more detailed exposition in his affidavit filed on the 18th July 2024 at paragraph 8. I accept these averments as the truth and they were not disputed.

[18] What the affidavits reveal is that the Defendant sought counsel's service from November 10, 2023. By December 8, 2023, the Defendant's counsel indicated that the Defendant could visit her office to sign the defence and he said he would be present at lunch on that date. The inference is that the defence was indeed signed, but was simply left on the file and not actioned.

[19] So from December 8, 2023 the Defendant still had time to file the Defence within the time allowed by the rules. So other than the assertion of inadvertence on the part of counsel, there is no good explanation as to why the Defence was so grossly out of time. For example, there is no evidence from the Defendant about what he did, after signing the defence, to see to it that his counsel filed same. In the Civil Procedure Rules era, litigants have a greater responsibility for the conduct of their case. They are no longer at the mercy of their Attorneys-at-Law and along for the

ride as passive participants. Litigants must demonstrate that they are themselves diligently pursuing their matters.

[20] Rule 1.3 of the Civil Procedure Rules says that it is the duty of the parties to help the Court to further the overriding objective. "Party" as defined under rule 2.4 includes both the party to the claim and any attorney-at-law on record for that party unless any rule specifies or it is clear from the context that it relates to the client or to the attorney-at-law only. The decision of Boodoosingh J (as he then was) in *Capital Plaza Hotel Ltd v Caribbean Football Union Limited*[2] said at paragraph 17 of his judgment on the issue of costs,

> *"Under the CPR, both or all parties are under an obligation to do what they can to assist in the just disposition of a claim. Such obligations must extend to the efficient disposition of a claim. A claim should not go on for longer than necessary."*

[21] I do bear in mind, however, the caution from the words of Phillips JA (as she then was) in *Murray-Brown v Harper*[3] where, in disposing of an application to set aside default judgment, she noted as follows concerning a litigant who blames their failure to comply with the rules on the inadvertence of counsel,

> *There is just one other matter that I must comment on however that is, the statement made by the learned trial judge that, "by no stretch of imagination can inadvertence be a good explanation for failing to file defence in the time stipulated". The fact is that there are many cases in which the litigants are left exposed and their rights infringed due to attorneys' errors made inadvertently, which the court must review. In the interests of justice, and based on the overriding objective, the peculiar facts of a particular case, and depending on the question of possible prejudice or not as the case may be to any party, the court must step in to protect the litigant when those whom he has paid to do so have failed him, although it was not intended. (See the St Margaret Insurance case).*

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[2] Unreported, High Court of Trinidad and Tobago, CV2014-01668 delivered May 27, 2015
[3] [2010] JMCA App 1 at para 30

[22] I consider that the Defendant had, up to December 2023, done all he could to prosecute his Defence with due expedition. The ultimate filing and service of his defence was for his attorney-at-law to do. But I have no evidence of his efforts to ascertain whether the defence was actually filed. A litigant is entitled to assume, as this defendant said he did[4], that once he has done his part, his lawyer would do hers. Perhaps this is now a signal to all litigants that they cannot take these things for granted. It is one of the major reasons why litigants are now required to attend at the Case Management Conference so that they themselves might get actual knowledge of the important dates and orders made by the Court.

[23] It is no longer the case that litigants are unaware of the timelines for responses when served with a Claim Form and Particulars of Claim. This is why the Prescribed Notes to Defendant are required to be served with the Claim Form and Particulars. The timelines are stated in the forms as well as the consequences for failure to comply. When served, litigants are expected to read them or have them read to them so they can appreciate the importance of compliance. The day may come when a litigant is held fully responsible for the defaults just as much as his/her attorney-at-law. But it is not in this particular case.

[24] In these peculiar circumstances, I cannot say that the Defendant has been wantonly careless in the prosecution of his defence and a larger portion of blame really does lie at the feet of his former attorneys-at-law.

[25] The Court has no evidence from former counsel as to why they did not file the Defence other than “inadvertence”. So in the round, I do not find that there has been a good explanation for the failure to file the Defence within the time prescribed.

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[4] See paragraph 9 of his July 18, 2024 affidavit.

[26] However, no evidence of prejudice to the Claimant has been put before the Court as a consequence of the delay in filing. This case is being dealt with reasonably promptly in the context of the usual pace of litigation in the Supreme Court and given the costs orders already made against previous counsel for the Defendant, the Claimant would have been, in my view, sufficiently compensated in costs for the delay occasioned by former counsel's poor handling of the matter.

[27] What is more, the failure to provide a good explanation for the failure to file the defence within the time prescribed is not necessarily fatal to an application to set aside a judgment in default.

IS THERE A DEFENCE WITH A REAL PROSPECT OF SUCCESS?

The Negligence Claim

[28] It is my finding that there has been revealed a defence with a real prospect of success insofar as the Defendant's affidavit evidence contains material that raises a more than arguable case that the Claimant may have contributed to his own losses by failing to properly secure his own premises.

[29] There is also a live question, based on the authority submitted by counsel for the Defendant of *Hannah v UWI*[5] as to whether a duty of care in negligence exists on a landlord to safeguard the tenants property from theft by a third party. The Court did point out to counsel that there are authorities from the United States that suggest otherwise[6], but this is indeed a live issue.

[30] The Claimant, in resisting the application made heavy weather of the fact that there was no draft defence properly exhibited to the Affidavit of the Claimant filed on May

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[5] Unreported, Supreme Court of Jamaica, CL 2000/H104, Daye J, October 19, 2004.
[6] See Merril, Irma W. Landlord Liability for Crimes Committed by Third Parties Against Tenants on the Premises Vanderbilt Law Review Vol. 38, Iss. 2. March 1985.

27, 2024. She based this on the fact that in the body of the Affidavit at paragraph 5, the draft defence is referenced as exhibit “DF1”. But the relevant exhibit (at least the one on the Court’s file) is noted as “DF-1” in the exhibit slip and as “DF-1” on the exhibit itself.

[31] Counsel showed the Court her copy of the document which purported to be “DS-1”. Counsel for the Defendant had her exhibit as “DF-1”.

[32] Counsel for the Claimant rightly argued that the Defendant breached rule 30.5(4)(b)(ii) and so cannot rely on the exhibit as the paragraph referenced in the body of the affidavit has a different exhibit reference as that in the exhibit slip and on the exhibit itself. So I agree that there was no draft defence.

[33] This also breaches rule 13.4(3) which states that the affidavit in support of an application to set aside a default judgment must exhibit a draft of the proposed defence.

[34] However, there is no consequence set out for failure to comply with rule 13.4(3). Putting it another way, the absence of a draft defence does not automatically render the application to set aside a default judgment a failure. The cases clearly demonstrate that what the Court should be concerned with is the **merit** of the case being put forward by the Defendant. There needs to be *evidence* of the merit in the affidavit. The decision of the Court of appeal in *Barrington Green et al v Christopher Williams et al*[7] makes this point quite well.

[35] In this case, the Defendant set out at paragraphs 36 and 37 of his affidavit filed on July 18, 2024, that the Claimant was advised of his own duty to protect his shop and the circumstances which would have given rise to the Claimant having a heightened sense of awareness of the potential for break-ins and so the need to

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[7] [2023] JMCA Civ 5

go the extra mile to secure his premises. This sets up a potential claim for contributory negligence.

[36] Counsel for the Claimant asserted that the Defendant has not raised a counterclaim and so cannot rely on contributory negligence. That argument was not with any merit as a claim for contributory negligence is distinct form a counterclaim.

[37] The Defendant also challenged the Claimant's claim that the perpetrators of the break-in used a box cutter (allegedly negligently left open to use by the Defendant) to gain access to the Claimant's premises. This evidence was provided in paragraph 39. The first sentence of paragraph 40 is not permissible evidence as the affiant is coming to a conclusion on a question of fact. However, the last sentence is admissible and provides a solid basis for refuting the Claimant's assertion in the Particulars of Claim as the Defendant said the box cutter was safely locked away.

[38] Paragraphs 41 *et seq* all seek to set up a claim for contributory negligence and provide evidence of the Defendant doing all it reasonably could to ensure that the common area was secure, but that the Claimant did not do all he could to secure his premises.

The Claim in Breach of Contract

[39] A major issue that has now arisen is that the Claimant's counsel has asserted in argument that the contract between the Claimant and the Defendant was an oral agreement and not a written agreement.

[40] This is rather late in the day and the Defendant had no opportunity to rebut that assertion by counsel.

[41] There was also nothing in the Claimant's Affidavit filed on the 8th July 2024 which suggests such a thing as an oral agreement. In fact, his affidavit discloses at exhibits "AB4 and AB5" what he purports to be written contracts between himself

and the Defendant from previous years. So how then is his counsel going to argue now that there was no written contract when the Claimant has given no evidence of an oral agreement?

[42] In his July 18, 2024 Affidavit, the Defendant asserted that the Claimant renewed his 2023 rental agreement without challenge or suggesting any changes in 2024 and exhibited the copy of the rental agreement. This evidence was not challenged. The Defendant also asserted that this was on the same terms as the previous agreement. If accepted, then the Court would have clear evidence of the terms of the agreement at the relevant time. It is also quite apparent that, but for an evidential error on the part of his former attorneys-at-law, the Defendant would have had a properly exhibited 2023 rental agreement. So counsel's assertion of an oral agreement is, to put it in the best possible light, curious.

[43] All that this does as well is open up potential arguments for the Defendant as to whether the terms asserted by the Claimant as being part of the contract and therefore breached were there expressly or by necessary implication in their purported oral landlord and tenant contract.

[44] The Defendant's argument about him not being the landlord and the landlord being a limited liability company is not on strong footing in my view.

[45] The Defendant is relying on the rental agreement, but the rental agreement contains no reference to a limited liability company as the landlord. The recital in the 2024 Agreement says "Powtronics Integrated Technology Services c/o Dr. Donald Farquharson".

[46] When notices are to be given, based on the terms of the renewed rental agreement, at clause 18, if a notice is to be given by the tenant to the landlord, it is the Defendant that is to be given notice and a copy to go to Shellion Farquharson. There is no mention of Powtronics being the recipient of any such notice.

[47] Concerning the substantive breach claims themselves, the Claimant asserts as breaches that:

a. the Defendant failed to continue to ensure that a watchman was hired to guard the premises of the Claimant at night time from Sunday to Sunday;
b. There was no watchman on the date of the incident; and
c. Failed to take any or any reasonable security measures to protect the premises in lieu of a watchman.

[48] It is my finding that in the July 18, 2024 affidavit, there is sufficient evidence of a meritorious response to these assertions. There is nothing in the renewed 2024 contract, which, as stated by the Defendant, was not changed from the 2023 contract, that contains any clause whatsoever relating to the hiring of a watchman for the Defendant's premises or hiring a watchman at all. So there is going to be a case with a real prospect of success as to whether such a term could or should have been implied into the contract.

[49] I also find that there is evidence of the practice of other tenants who hired their own security that raises an argument with a real prospect of success that it was the tenant's responsibility to secure their own property.

[50] Again, the question of whether or not the Defendant had a contractual obligation as a landlord to the Claimant to secure the Claimant's property is a live one and was properly raised on the evidence before the Court.

CONCLUSION

[51] In all the circumstances, I am satisfied that there has been raised sufficient evidence before the Court to demonstrate that there is merit to the Defendant's case that he was not liable to the Claimant in either contract or negligence.

[52] Though he had no good explanation for the failure to file his defence in the time prescribed, the substantial blame for this rests on his former attorney-at-law. The Claimant has been adequately compensated for this default, in my view, and there

was no other evidence of prejudice suffered or to be suffered by the Claimant if the Defendant is allowed to defend the claim. Further not much time has been lost in all the circumstances. Therefore, I am not minded to weigh this factor against the Defendant.

DISPOSITION

1 The judgment in default entered against the Defendant on May 7, 2024, is set aside.

2 Costs to the Claimant to be taxed if not agreed less the sum of $75,000.00 paid as wasted costs by former counsel for the Defendant.

3 The Defendant's Defence filed on the 16th May 2024 shall be allowed to stand as if filed and served within time.

4 Leave to appeal is refused.

Dale Staple
Puisne Judge