[2017] **JMSC Civ. 34**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV 02870

BETWEEN	**CHESEINA BROOKS (an infant suing by her next friend WILBERT BROOKS)**	**CLAIMANT**
AND	**DAVERN RUMBLE**	**DEFENDANT**

IN CHAMBERS

Mrs. Pamela Shoucair-Gayle instructed by Pamela Shoucair-Gayle and Co. for the Claimant.

Mrs. Camille Wignall-Davis and Ms. Ayana Thomas instructed by Nunes, Scholefeild, Deleon & Co for the Defendant.

Heard: Various dates culminating on 21st November, 2016 and Delivered 3rd March, 2017

Default Judgment - Setting aside Default Judgment - Requirements for setting aside Default Judgment - Credibility of witnesses - Civil Procedure Rule 13.2 and 13.3 - Whether judgement should be set aside as of right.

BERTRAM LINTON, J

BACKGROUND

[1] The Claimant is a minor who has brought a claim for damages through her next friend and father arising out of a motor vehicular accident which took place on the Dunns River Main Road in the parish of Saint Ann on the 31st day May 2006.

[2] In her Claim Form filed on the 21st day May, 2012, the Claimant alleges that on the day in question, she was lawfully crossing the street when the Defendant so negligently drove his Toyota Corolla Motor Vehicle causing it to collide into her. She was injured and seeks special damages in the sum of thirty two thousand and fifty two Jamaican Dollars ($ 32, 052.00) and six thousand four hundred and fifty United States Dollars (US$ 6, 450.00), general damages, interest and costs.

[3] On the 10th September, 2012, the pleadings were said to have been served on the Defendant at his last known address being Lot #5 Lawrence Street, Bailey's Vale, Port Maria in the parish of Saint Mary. An affidavit of service was completed by the Bailiff of the Port Maria Resident Magistrate Court, Mr. Bradley Morris who effected service.

[4] Notice of proceedings where served on Key Insurance Company, the insurers of the Defendant's motor vehicle. No acknowledgement of service or defence was filed within the requisite time and so the Claimant made a request for Default Judgment to be entered against the Defendant on the 23rd November 2012. On the same day the affidavit of service was filed.

[5] On the 19th February, 2013, the Defendant filed a Notice of Application to set aside the default judgement. This is the application now before us. The court heard from Mr. Bradley Morris, the bailiff who executed the affidavit of service as well as from the Defendant himself.

THE APPLICATION

[6] Counsel for the Applicant and Defendant contends that based on the nature of the case before the court, the default judgment should to be set aside on two grounds. They relied on the Civil Procedure Rules, particularly rule 5.3 as it relates to service of a claim and 13.2 and 13.3 as to setting aside default judgment as of right and at the court's discretion.

[7] Firstly, they argued that judgment should be set aside as of right because the Defendant was not personally served with the Claimant's claim documents. They contend that the Defendant was not living at the address where the documents were left on the date of service and so could not have been served.

[8] Based on correspondence with Mr. Morris, it was said that he went to Bailey's Vale and enquired of a Mr. Rumble. Counsel pointed out that the Defendant's Father Joseph Rumble was living at the premises at the time of the service of the document and thus he might have been the person served.

[9] Further to this, Counsel Mrs. Wignall-Davis says in her affidavit that upon making contact with Mr. Morris he told her that he served the documents on an *'old person and was not within the age group [they] had discussed.'* At the time of service the Defendant was 25 years of age, therefore the contention for the Applicants is that this piece for evidence confirms that he was never served. It was his father who was served.

[10] Secondly, and alternatively they contend that the Defendant has presented a case which has a reasonable prospect of success. They say that default judgment can be set aside at the discretion of the court where it is shown that the Defendant has a reasonable prospect of successfully defending the claim.

[11] The argument being presented is that on the day in question, the Claimant traversed the roadway in front of the Defendant's car so quickly that there was nothing he could have done to prevent the collision. Based on the circumstances

of the events, it was highlighted that she came from behind a stationary bus which was obstructing the Defendant's view of her.

THE RESPONSE

[12] Counsel for the Claimant, argues that the Defendant was properly served with the Claim documents and as such it is as a result of his complacency that a defence was not filed. She says that there are no breaches in service. She further asserts that the fact that Mr. Morris did not state the specific address at which he served the documents was a minor defect in his affidavit of service which has been cured by the fact that at trial he gave evidence to specify the place of service which matches the description of the residence which Mr. Rumble used to live.

[13] The Claimant's main argument was that when the Defendant reported the matter to Key Insurance, he was told that someone was interested in suing him in relation to the accident. He therefore had knowledge of the fact that a claim was going to be made against him. The fact that the Defendant has now become a *'wondering jew'* is coincidental and his evidence as to his various places of residence ought not be believed.

[14] She further contends that the Defendant has been disingenuous in respect of his behaviour towards the Claimant. It was highlighted that he never made contact with the Claimant's father to find out how she was doing or to enquire as to whether she had died. The fact that the Defendant has severed all ties from the Claimant and her father is to be viewed as evidence of his deceptive nature.

ISSUES

[15] The issues which must be evaluated are:

(a) Whether the applicant has locus standi in light of the fact that no Acknowledgement of service had been filed

(b) Was the claim properly served on the Defendant

(c) If so, does the Defendant have a real prospect of successfully defending the claim

THE LAW

[16] Part 13.4(1) stipulates that:

> *An application may be made by any person who is directly affected by the entry of judgment.*

[17] It is to be noted that the Motor Vehicle Insurance (Third-Party Risks) Act provides at section 18(1) that:

> *18.-(1) If after a certificate of insurance has been issued under subsection (9) of section 5 in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under subsections (I), (2) and (3) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment the amount covered by the policy or the amount of the judgment, whichever is the lower, in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.*

[18] Part 12. 4 of the Civil procedure rules stipulate what conditions ought to be met when judgement is to be entered for failure to file an acknowledgement of service, In particular the part says that:

> *The registry at the request of the claimant must enter judgment against a defendant for failure to file an acknowledgment of service, if -*
>
> *(a) the claimant proves service of the claim form and particulars of claim on that defendant ;*
>
> *(b) the period for filing an acknowledgment of service under rule 9.3 has expired;*
>
> *(c) that defendant has not filed -*
>
> *(i) an acknowledgment of service; or*
>
> *(ii) a defence to the claim or any part of it;*

(d) where the only claim is for a specified sum of money apart from costs and interest, that defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it;

(e) that defendant has not satisfied in full the claim on which the claimant seeks judgment; and

(f) (where necessary) the claimant has permission to enter judgment.

[19] Rule 5.3 stipulates that:

A claim form is served personally on an individual by handing it to or leaving it with the person to be served

[20] In relation to proper service of the statement of case, rule 5.5 states that:

(1) Personal service of the claim form is proved by an affidavit sworn by the server stating -

(a) the date and time of service;

(b) the precise place or address at which it was served;

(c) the precise manner by which the person on whom the claim form was served was identified; and

(d) precisely how the claim form was served.

(2) Where the person served was identified by another person, there must also be filed, where practicable, an affidavit by that person-

(a) proving the identification of the person served; and

(b) stating how the maker of the affidavit was able to identify the person served.

(3) Where the server identified the person to be served by means of a photograph or description, there must also be filed an affidavit by a person -

(a) verifying the description or photograph as being of the person intended to be served; and

(b) stating how the maker of the affidavit is able to verify the description or photograph as being of the person intended to be served.

[21] Default judgment must be set aside as of right by virtue of part 13.2. There is no discretion here, but strict compliance is demanded with the rules for service. The part says that:

> *The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because -*
>
> *(a) in the case of a failure to file an acknowledgment of service, any of the conditions in rule 12.4 was not satisfied;*
>
> *(b) in the case of judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied; or*
>
> *(c) the whole of the claim was satisfied before judgment was entered.*

So if service was never effected at all as alleged by the applicant this would mean the judgment had to be set aside.

[22] In addition to the ability to set a default judgment aside as of right, the court has discretion to set it aside in keeping with Part 13.3 of the CPR. The parts states that:

> *(1) The court may set aside or vary a judgment 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.*

[23] In the case of ***Swain v Hillman*** *[2001] 1 All ER 91* Lord Woolf MR of the the English Court of Appeal in considering the meaning of the words "real prospect of success" said that:

> *The words 'no real prospect of success' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or as Mr. Bidder QC submits they direct the court to the need to see whether there is a realistic as oppose to fanciful prospect of success.*

[24] ***Swain's*** principles have been adopted by our courts, particularly in ***Nadine Billone v Experts 2010 Company Ltd*** *[2013] JMSC Civ 150* where Anderson K., J said that:

> *a claim may be fanciful where it is entirely without substance, or where it is clear beyond question that the statement of case is contradicted by all the documents or other material on which it is based.*

ANALYSIS

[25] I have given careful thought to all the submissions presented and all the arguments and case law as cited, I have no intention of reiterating them here in detail but will refer to them as is necessary to explain my reasoning and decision in this matter.

A. *Issue 1*

[26] The first and may be the most important issue is whether the Applicant, Key Insurance has locus standi to make this application. The importance of this issue is such that it may very well make or break the Applicant's case.

[27] Rule 13.4(1) of the Civil Procedure Rules provides that an application to set aside default judgment can be made by *'any person who is directly affected by the entry of the judgment.'* By this logic, the core matter for the court's determination is whether the Applicant would have been directly affected by the fact that judgment was entered against the Defendant.

[28] Section 18(1) of the Motor Vehicle Insurance (Third Party Risks) Act provides in no uncertain terms that once an insured is found liable for an act which is covered by his insurance policy, his insurer is liable to pay the person to whom judgment is granted. Therefore, if the insurance policy existent between the Defendant and the applicant was at the time valid and provided for the accident which took place on the 31st May, 2006, then Key Insurance would be directly affected by the fact that judgment was entered against the Defendant. Notably, the evaluation of whether the insurance policy covers the accident is fact based and as such I will evaluate the evidence presented.

[29] In her affidavit supporting the application to set aside default judgment, Ms. McCook said that Key Insurance *'was the insurer of the Defendant's said motor*

vehicle at the material time under a Third Party Policy of Insurance.' This admission I have interpreted to mean that the policy which existed was one which covered the risk involved and more importantly was valid at the time of the accident. I have also noted that the Defendant in his evidence also admits that he had an insurance policy with Key at the time of the accident which expired sometime after the accident. He also said that after the expiration of the policy, he had to register with a different insurance agency as the policy sum had increased at Key and he could no longer afford their coverage.

[30] I accept the evidence of Ms. McCook and Mr. Rumble and find that on the facts there is nothing to contradict their statements. As such, I find that a valid policy existed between the applicant and Defendant.

[31] In examining the Claimant's submissions on the point, it was noted that counsel placed heavy reliance on ***Janet Edwards v Jamaica Beverages Limited*** *(unreported) CL No. 2002/E-037* in which Sykes J examines and explains the importance of filing an acknowledgement of service in order to properly appear before the court. Counsel submitted that since the applicant did not file an acknowledgment of service, they cannot be heard by the court as they have not properly put in an appearance. Sykes J examined the application by Jamaica Beverages in a two pronged approach.

[32] Firstly, he looked at whether an application to strike out or any application for that matter could properly be maintained to act as barrier to judgment being entered when no acknowledgment of service was filed. His explanation of the importance of filing an acknowledgement of service therefore pertains to their application to strike out Ms. Edwards claim and not to the issue of default judgment.

[33] Secondly, he examined their application to set aside default judgment. Here Sykes J explains that judgment in default can be set aside on two grounds however the one applicable to Jamaica Beverages would have been the court's

discretionary powers. He asserted that in this regard, an evaluation of their proposed defence led to his ultimate decision to refuse the application.

[34] Counsel seems to have misconstrued the finer points of this judgment. The importance of Part 9, 10 and 13 of the CPR cannot be seen if they are applied in isolation. These parts must be read in conjunction with one another. As such, the take away point from Sykes J obiter remarks is the general principle is the court will not entertain any application from a party who has not complied with rule 9 and file an acknowledgement of service. However, where no acknowledgement of service is filed, the said party may apply to set aside a judgment that is otherwise obtained regularly by way of seeking the court's discretion. This I believe does not apply to the case at hand as the applicant is not a party to the claim and would not have had occasion to file an acknowledgment of service. Furthermore, their locus standi in the matter is reliant upon their relationship with the Defendant and whether they would be affected by the judgment entered against him in the matter.

[35] I agree with the Applicant's submission on the point, particularly the case of ***Linton Williams v Jean Wilson, Harris Williams and Insurance Company of the West Indies*** *(1989) 26 JLR 172* which posits that the contractual nature of the insurance policy of an insurer and insured guarantees that the insurer can be liable for judgments made against the insured where the policy covered the matter at hand.

[36] Therefore, I find that the Applicant has locus standi to bring this claim by virtue of the fact that they are directly affected by entry of judgment in the matter as they may be liable to pay the sums claimed by the Claimant.

B. *Issue 2*

[37] The CPR provides that judgment in default **must** be set aside where the conditions under rule 12.4 are not satisfied. One of the requirements of rule 12.4 is that *'the claimant proves service of the claim form and particulars of claim on*

the Defendant.' Further to this rule 5.1 provides that the claim form must be personally served on the Defendant. Therefore, in order for judgment to be set aside as of right, the Defendant must prove that rules were not strictly followed, particularly as it relates to service.

[38] The issue of service is one which the court must consider on a balance of probabilities. In doing so I must consider the evidence as presented by Mr. Bradley Morris and Mr. Davern Rumble. It is upon a determination of whose evidence I find to be more credible, that the outcome of the matter at hand will rest.

[39] Mr. Morris contends that on the 10th September 2012, he went to Lot #5 Baileys Vale in the parish of Saint Mary and enquired as to whether Mr. Rumble was living at the premises. His evidence is that he called Mr. Rumble by the name and a man came to the gate, identified himself as Davern Rumble as noted on the documents and he handed the documents to Mr. Rumble.

[40] On the other hand, the Defendant's evidence is that at the time of service he was not living at Baileys Vale but in Oracabessa. His evidence is that he used to live in Baileys Vale a few years prior to the accident, however, in 2007 he moved to live in Coloraine, Oracabessa. In 2008 he moved to Days Mountain, Oracabessa and resided there till 2015. The main point being stressed was that at the time of service, he was not living at Baileys Vale.

[41] There are a few things which stand out to me in relation to Mr. Morris and Mr. Rumble's viva voce evidence as opposed to affidavit evidence from various sources in the matter, these being:

(a) The Defendant was adamant that he did not reside at Baileys Vale at the time the document are alleged to have been served. When compared, his affidavit and viva voce evidence are consistent. It is also noted that his evidence is also confirmed by the affidavit evidence of other witnesses in the matter as seen below.

(b) It is noted that in 2007 Key Insurance company requested and received a report of the accident from the Defendant. At this time he gave his address as Oracabessa. I find that this is consistent with his evidence of the places he resided after moving from Baileys Vale and that he was not living in Baileys Vale as he maintains.

(c) In her affidavit evidence, Mrs. Wignall-Davis detailed her correspondence with Mr. Bradley Morris after Key Insurance was unable to make contact with the Defendant. She averred that Mr. Morris returned to Baileys Vale in 2014 and was informed that 'Mr. Rumble' had migrated to Canada. Notably, the Defendant's evidence is that his father moved to Canada and rented out the premises at Bailey's Vale. This evidence is important as it is almost as though Mr. Morris was not sure which Mr. Rumble he was enquiring about and this is pertinent to service of the documents.

(d) It is also noted in the correspondence between Mr. Morris and Mrs. Wignall-Davis that he indicated to her that he served the claim documents on an old person. On the other hand, Mr. Morris in his affidavit evidence said that he served the document on man that was older than 29 years of age. However, at the time of service, the Defendant was in his early twenties. This inconsistency is again important as it highlights the possibility that the wrong Mr. Rumble was indeed served.

(e) Mr. Morris's affidavit evidence and viva voce evidence are not in sync. In his affidavit he said that when he went to Baileys Vale and enquired of the Defendant the gentleman told him he was Mr. Rumble. There is no mention of whether this person was indeed **Davern** Rumble. In his viva voce evidence he says asked for Davern Rumble and the person on whom the documents were served confirmed that he was the said Davern Rumble as stated on the claim documents. I find this inconsistency to be very important as it goes to the heart of the issue of service. In this

particular case, there is a dire need to be specific and I find Mr. Morris' evidence leaves the court to do some amount of guesswork.

(f) Though I agree that some time has passed since the service of the documents and the hearing in chambers, I must highlight that Mr. Morris was not able to identify Defendant in chambers. His logical explanation was that he simply could not remember him having served the documents so long ago. However, in light of the other issues which have arisen in relation to the service of the documents, it would have been more imperative that he identify the Rumble upon who he served the documents.

(g) When all the issues are viewed together, I find that I have not been satisfied on a balance of probabilities that the claim documents were indeed served on the Defendant in the case. There are too many inconsistencies and loose ends which leaves the court in doubt:

i. Evidence of Mr. Morris saying that he served the documents on an old man when the Defendant is a young man;

ii. Mr. Morris' visiting the said premises in 2014 and enquiring of the said Mr. Rumble and being told that he had migrated makes it seem as though he did not know which Rumble he was enquiring after;

iii. Mr. Morris' inability to identify Mr. Rumble in chambers and all this set in the context that he did not serve the proper person, leaves the court unconvinced that service was in fact effected;

iv. The Defendant is adamant about the fact that he simply was not served.

[42] Finally, I must note that though counsel for the Claimant seems to insinuate that the Defendant had known that someone intended to sue him, I must stress that this is no substitute for actual service of the documents. The submission that he conveniently moved about because of his knowledge of the accident case is also unsupported by any evidence in these circumstances.

[43] Based on the above discussion, I find that the Defendant is a more credible witness and I believe him when he says he was not served with the claim documents as he was not residing at the address where the documents were served. In conclusion I find that proper service of the claim documents was not effected in accordance with the CPR.

C. *Issue 3*

[44] Having found that Default Judgment ought to be set aside as of right, the discussion of this issue has become unnecessary. This would mean that the claim filed on 21st May 2012 was not served within the time permitted under the CPR and therefore would not be valid for service even at this time.

CONCLUSION

[45] In conclusion, I find that default judgment judgment ought to be set aside as of right based on the fact that I have found that the Defendant was not properly served.

[46] Therefore, the court orders that the default judgement entered in this matter is hereby set aside.