[2020] JMSC Civ 103

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2010HCV04873

BETWEEN	**JUNIOR CARMOCK**	**CLAIMANT**
AND	**GARTH TOYLOY**	**1ST DEFENDANT**
AND	**NICOLOE ANDERSON**	**2ND DEFENDANT**
AND	**ELVIS VASSELL**	**3RD DEFENDANT**

CONSOLIDATED WITH 2010HCV04874 FOR THE HEARING OF THE APPLICATION

BETWEEN	**PAUL THOMPSON**	**CLAIMANT**
AND	**GARTH TOYLOY**	**1ST DEFENDANT**
AND	**NICOLOE ANDERSON**	**2ND DEFENDANT**
AND	**ELVIS VASSELL**	**3RD DEFENDANT**

IN CHAMBERS

David Johnson instructed by Samuda Johnson for the 1st Defendant/ Applicant

Raymond Samuels instructed by Samuels and Samuels for the Claimants/ Respondents

Application to set aside default judgments – Claim not served on the Defendant – "slip rule" – correction of an order not reflecting the intention of the Court – CPR 13.2, 13.3, 42.10

Application heard on May 22, 2020

CORAM: PALMER, J

[1] The instant application by the 2nd Defendant, Nicoloe Anderson, is to correct an order of this Court made on April 7, 2017. The order related to an application to

set aside judgments entered in default of acknowledgement of service, against Mr. Anderson, in regards to a motor vehicle collision that occurred on October 28, 2004. The Claimants in the consolidated claims, were passengers in a vehicle operated by the 3rd Defendant, for which Mr. Anderson is the registered owner, when there was a collision with a vehicle driven by the 1st Defendant. They contend that the collision arose either solely due to the negligence of the 1st Defendant or together with the 3rd Defendant, whom they allege was the 2nd Defendant's servant and/or agent.

[2] The Claims were filed on October 5, 2010, shortly before the expiration of the relevant limitation period, and affidavits of service were filed in for each claim on November 2, 2011. The respective affidavits of service (which were almost identical for each claim) state as follows:

> *"(4) That on the 11th day of October 2010, Mr. Norman Samuels, Attorney-at-Law... delivered into my hands the following documents:*
>
> *(a) Claim Form...*
>
> *(b)) Particulars of Claim...*
>
> *(5) That the said Mr. Norman O. Samuels gave me instructions to serve the said documents on the 2nd Defendant named in the said documents;*
>
> *(6) That service was effected on the 2nd Defendant, NICOLE ANDERSON at Apartment 10, 3 Border Avenue, Kingston 19 in the parish of St. Andrew by me delivering to and leaving with the said Defendant NICOLE ANDERSON the said sealed copy of the Claim Forms and true copy of the Particulars of Claim between hours of 8:00 am and 10:00 am on the 12th day of October 2010.*

(7) That at the time of service as aforesaid the said second Defendant was not known to me personally but was pointed out to me by the Claimant who accompanied me for that purpose."

[3] The Claimants used the same process server to effect service on Mr. Anderson and according to the process server in his affidavit of service in each claim, each Claimant accompanied him for the purpose of identifying Mr. Anderson, who was not previously known to him. The Claimants never asserted that they had ever met Mr. Anderson prior to the purported service of the claims, or somehow knew what he looked like despite not having met him or that they attended with the process server to serve documents on Mr. Anderson. The 2nd Defendant, on the other hand, maintained throughout that he was not served the claim and never met the process server or any of the Claimants. Unfortunately, by the time of the hearing the process server was not available for cross-examination.

[4] The 2nd Defendant applied to have the judgment set aside pursuant to rules 13.2 and 13.3 of the Civil Procedure Rules, 2002 ("CPR"). Pursuant to rule 13.2, the ground on which Mr. Anderson sought to have the judgment set aside was that it was irregularly entered as he was not personally served with the claim, despite the assertion to the contrary by the process server. In the circumstances of this case, he was entitled to have the default judgment set aside if he satisfied the Court that he was never personally served the claim. Mr. Anderson stated that based on the hours he worked as a tow truck driver, he was not at home between 8 am and 10 am when the process server averred that he had served him with the respective claims.

[5] Mr. Anderson had filed a claim against the driver of the 3rd party vehicle, on October 27, 2010 and after a defence was filed in that matter, there was the automatic referral to mediation. Upon attending the Dispute Resolution Foundation on September 25, 2013 his Attorney-at-law was informed of the existence of the claims, the subject of this application, and that Judgment in Default had been entered in both matters for failing to file an acknowledgement of service or defence.

[6] Alternatively, orders were sought under rule 13.3 on the basis that the 2nd Defendant has a real prospect of successfully defending the Claim and should be granted leave to file a defence out of time. Mr. Anderson's defence to the claim is that he delivered his motor car to a used-car sales company in St. Mary to facilitate its sale and when it was not sold, the company was to have it returned to him in Kingston. While it was being taken to him, the company's agent who drove the vehicle, took along the Claimants, without the knowledge or permission of the company or the 2nd Defendant. On this ground, he affirmed that he had a real prospect of successfully defending the claim, were the Court to find that he had been served with the claims.

[7] Rule 12.4 of the Civil Procedure Rules, 2002 ("CPR") provides that the Registry must enter judgment in default where the Claimant proves service of the Claim Form and Particulars of Claim and a Defendant fails to file an acknowledgement of service. Rule 13.2 provides:

> *(1) 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.*
>
> *(2) The court may set aside judgment under this rule on or without an application.*

[8] Pursuant to Rule 13.2, where a default judgment is irregularly entered, the Court must set it aside and may even do so without a formal application having been made. The Court has no discretion to do otherwise than to set the judgment aside. Having ruled that there was no service of the claims on Mr. Anderson, the default judgment was set aside as being irregularly entered, pursuant to rule 13.2. The orders made on the application to set the default judgments aside were as follows:

1. *The Default Judgements entered in Claim No. 2010 HCV 04874 and Claim No. 2010 HCV 04873 against the 2nd Defendant be set aside as having been irregularly entered;*

2. *The 2nd Defendant granted leave to file his defence within 14 days of his order.*

[9] There has been no appeal of that ruling, and the instant application concerns order 2 requiring the 2nd Defendant to file a defence. It is true the 2nd Defendant became aware of the claim, albeit through the efforts of his Counsel after default judgment had been entered, but he has never been served with the claim and particulars as required by the CPR. The CPR requires that for the default judgment to stand there must be service of the claim on the defendant and there is no discretion to order that a defendant file a defence where it has not been shown that he has been served the claim in accordance with the CPR.

[10] After my ruling, the 2nd Defendant filed an application to have the ruling corrected pursuant to Rule 42.10 of the CPR, which provides:

> *(1) The court may at any time (without an appeal) correct a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission.*
>
> *(2)) A party may apply for a correction without notice.*

[11] The submission of Counsel for the 2nd Defendant was that the Court has the power to correct errors in an order made by it, which arise from accidental slips and omissions, so as to bring the order into conformity with that which the Court intended. Reliance was placed on ***Dalfel Weir v Beverley Tree*** SCCA no. 37/2011 [2016] JMCA App 6 which concerned an Application to vary an order of that Court on the ground that it was ambiguous in its terms and had produced an inconsistency with the Court's intention. The Court had previously made an order for the preparation of an updated valuation of a family home and the appellant was afforded first option to purchase the family home and which was to be exercised within three (3) months of the order for sale.

[12] The attempt by the Applicant in ***Dalfel Weir*** to exercise the option was resisted by the Respondent on the basis that the time within which the Applicant was entitled to exercise the option had expired. The Applicant argued that this option could not be exercised until the valuation had been conducted and the Applicant was aware of the price. The Applicant contended that the ambiguity in the Court's previous order produced an inconsistency with the Court's intention and that the same should be clarified to explain that the option was exercisable within three (3) months of the date of the receipt of the updated valuation report, failing which it should lapse.

[13] Morrison P (Ag.) (as he then was) at paragraph 17 of the decision stated:

> *This court has the power to correct errors in an order previously made by it arising from accidental slips or omissions, so as to bring the order as drawn into conformity with that which the court meant to pronounce. In considering whether to exercise this power, the court will be guided by what appears to be intention of the court which made the original order. In order to determine what was the intention of the court which made the original order, the court must have regard to the language of the order, taken in it context and against the background of all relevant circumstances, including (but not limited to) (i) the issues which the court which made the original order was called upon to resolve; and (ii) the court's reasons for making the original order. While ambiguity will often be the ground upon which the court is asked to amend or clarify its previous order (as in this case), the real issue for the court's consideration is whether there is anything to suggest that the actual language of the original order is open to question.*

[14] The learned President further stated at paragraph 21:

> *In these circumstances, I find it impossible to suppose that the court making the original order could have intended that the Applicant should lose his first option because, as has now happened, the updated valuation did not become available until the very day when … his right to exercise it had expired.*

To do so, it was opined, would be to attribute to the order a meaning quite opposite to what had been the clear intention.

[15] It was submitted that given the fact that the Court was asked to determine whether service of the Claim Form and Particulars of Claim had been effected on the 2nd Defendant, that having ruled it had not, the 2nd Defendant was entitled to have the judgment set aside as of right. He was also entitled to have the Claim and Particulars served on him. The further order permitting that the defence to be filed out of time, it was submitted, was an accidental slip by the Court as it ran contrary to the clear intention of the Court.

[16] For the Claimants it was submitted that the 2nd Defendant had no standing to make the instant application as he had filed no acknowledgement of service. Ironically that was not seen as a barrier to the 2nd Defendant filing a defence. It was also argued that there was no standing to challenge the jurisdiction of the Court. In the alternative, it was submitted that Rule 42.10 does not apply to the instant case as there was no clerical error or mistake by the Court. Further, it was contended, the 2nd Defendant having taken active steps in the proceedings, implicitly waiving any irregularity in the proceedings to include that fact of his non-service of the claim. The steps being referred to were that the 2nd Defendant was alleged to have participated in the mediation process and had had settlement discussions without objecting to the jurisdiction of the court. Having done so, it was argued, the 2nd Defendant had waived any defect in the process by which he had been brought to Court. In his submissions Counsel argued that the parties having engaged in settlement discussions the Claimant was led to believe that Mr. Anderson had accepted the claim and the jurisdiction of the Court. He contended that constituted an unequivocal representation to the Claimants that the 2nd Defendant did not contest the issue of service nor objected to being involved in the process.

[17] Reliance was placed on ***Baker Hughes Ltd v Steadfast Engineering*** [2009] EWHC 3123 (QB) where the court considered what constitutes a step in proceedings. Although the court in that case was dealing with an arbitration provision, the principle, it was submitted, applies to the instant case. Letters and other correspondence between the parties were held to have constituted a step in the proceedings as the court would

have had to be involved in drawing up a court order. The learned, Judge Shaun Spence QC, stated at paragraph 32 that:

> *It seems to me that while definition is something which I do not intend to essay, it would not be right to say that taking a step to answer the substantive claim means that the defendant should have gone so far as to lodge a defence or some sort of statement or affidavit setting out what his answer to the claim is.*

[18] In the instant case it was submitted that the 2nd Defndant had done much more than what had been done in ***Baker Hughes*** in having participated fully in mediation and invited written communication from the Claimants. It was posited that rule 42.10 was designed to bring the judgment or order complained of into conformity with the intention of the Court but that there was no ambiguity nor mistake in the order of April 7, 2017. The order was perfectly understood, conveyed the Court's clear intention and should be left in place.

[19] Counsel submitted further that in ***Dalfel Weir*** relied upon by the 2nd Defendant, Phillips JA adopted the statement of Lord Watson in ***Hatton v Harris*** [1892] AC 547.

> *...When an error of that kind has been committed it is always within the competency of the Court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the judge obviously meant to pronounce…*

[20] The comment from Lord Watson, it was submitted, was especially important for the Claimants, as they have acted upon the order of the court by filing requests for default judgments and it would be inequitable for the Court to correct any obvious error by deleting words from the order made when there was not any error. Further, Counsel directed the Court to a portion of ***Dalfel Weir*** where Phillips JA cited ***Mutual Shipping Corporation of New York v Bayshore Shipping Co of Monrovia*** [1985] 1 All ER 520 as follows:

> *"It is the distinction between having second thoughts or intentions and correcting an award of judgment to give true effect to first*

thoughts or intentions which creates the problem. Neither a judge nor an arbitrator can make any claim to infallibility. If he assesses the evidence wrongly or misconstrues or misappreciates the law, the resulting judgment will be erroneous but it cannot be corrected. The remedy is to appeal."

[21] It was submitted that the same principle accepted by Phillips JA is applicable to the instant case as there was no accidental slip but an intended decision which this Court later accepted as having been erroneous. In the circumstances it was submitted that the only remedy that was open to the 2nd Defendant was to appeal. In interpreting the said paragraph 2 of the order made on the April 7, 2017 reliance was placed on the Privy Council decision in ***Sans Souci v VRL Services Ltd*** [2012] UKPC per Lord Sumption at paragraph 13 which was relied on by our Court of Appeal in ***Weir*** [supra] at paragraphs 16 and 78:

> *…the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve.*

[22] It was submitted that the said paragraph 2 of the order clearly highlighted that the Court intended for the 2nd Defendant to file a Defence and as such regularise his situation in the Court, as he had taken a step in the proceedings that showed his intention to participate. The Court, it was submitted, made its order under those circumstances applying the overriding objective and as such was complete and final. There being no ambiguity, it was submitted that the 2nd Defendant ought to have filed his Defence. Counsel submitted that this was not a case as in ***Weir*** where the order was ambiguous and/or flawed. Also the Applicant/2nd Defendant waited seventeen (17) months in order to file his application once again giving credence to the fact of having

the Claimants believe that their matters would be progressing against all the Defendants. In the circumstances, it was submitted, the Applicant/2nd Defendant is estopped from bringing the instant application. On this point, it is important to point out that the 2nd Defendant's Application was filed in 2017, shortly after the ruling, but was unfortunately not placed before a court until January 2019.

[23] As it relates to whether or not the Court could make an order setting the judgment aside due to non-service of the claim as well as to direct the 2nd Defendant to file a defence, reliance was placed on the decision of ***First Global Bank Limited v Garfield Dussard*** [2015] JMSC Civ. 19, a decision of the Rattray, J. In, ***First Global*** the learned judge ruled that having set aside a default judgment, the Court was not inhibited in making further orders, having found that the judgement was irregular and "… that is not necessarily the end of the matter…"

[24] The learned judge went further at paragraph 30 to state:

> *This Court is obliged when dealing with matters before it to ensure that the overriding objective of the Rules is achieved, that is, to deal with matters justly. This entails ensuring that the matter is dealt with expeditiously and fairly [Rule 1.1 (2)(d)], saving expense [Rule 1.1 (2)(b)] and allotting to it an appropriate share of the Court's resources, bearing in mind the need to allot resources to other cases [Rule 1.1 (2)(e)]."*

[25] It was submitted that the Court in looking at the matter had the further evidence of the 2nd Defendant participating in mediation and was obliged to ensure that the overriding objective of the Rules of Court was achieved and as such made the necessary order herein which the 2nd Defendant seeks to remove. It was further contended that Rule 26.9 of the CPR is applicable in circumstances. Rule 26. 9 reads as follows:

> *(1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.*

> *(2) An error of procedure of failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.*
>
> *(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.*
>
> *(4) The court may make such an order on or without an application to a party.'*

[26] It was therefore contended on behalf of the Respondents/Claimants that on April 7, 2017 the Court made orders to 'put matters right'.

Analysis

[27] It is important to point out that the decision of Rattray, J in ***First Global Bank Limited*** is distinguishable from the instant case on the facts. While the Court in that matter did set the default judgment aside, it found that the claim and relevant documents had been served, with the exclusion of certain prescribed documents, namely Form 6 – a form of application to pay by instalments. Quite coincidentally, the parties had held discussions after the service of the Claim Form and Particulars of Claim and the learned judge at paragraph 25 of his decision found that these discussions, even where there was an admission of the debt, did not amount to a waiver of any irregularity in service of the mandated Court forms. The learned judge while setting the default judgment aside, found that the Claim had been served except for the prescribed form. He also found that the Defendant had made an admission of the debt and asked for time to pay it and found, as a consequence of the admission, that judgment could be entered on admission in accordance with the provisions of Part 14 of the CPR. In the instant matter there has been no such admission and the Claimants failed to show on a balance of probabilities that service of the claim was effected.

[28] I find the judgment in ***Dalfiel Weir*** to be particularly instructive in this case. The disputed issue in the initial application was whether or not the 2nd Defendant had been served. If the finding was that Mr. Anderson was served, then the Court would, of

necessity, have had to proceed to determine the requirements under rule 13.3 and if set aside under that rule, time could be allowed for the filing of a defence. Having found that he was not served, Mr. Anderson was entitled to have the judgment set aside pursuant to rule 13.2, as default judgment was irregularly entered. It would appear that settlement discussions did ensue, but I did not find that any step had been taken in these proceedings, despite those discussions, that could be viewed as a waiver of the irregularity of nonservice. Once the Court found that the requirements of Rule 13.2 were met, there was no discretion to do anything but to set the judgment aside. Never having been served, there is no basis to order that a defence be filed. I clearly stated in my ruling that the judgment was being set aside as being irregularly entered, which was pursuant to rule 13.2.

[29] Applying the principle in ***Dalfiel Weir***, order 2 was an inadvertent slip, which ran contrary to the spirit of the ruling and my intention. So as to bring the order as a whole into conformity with the Court's intention at the time of ruling on April 7, 2017, the 2nd Defendant's application is granted, and the following orders are made:

1. *Order of April 7, 2017 setting aside the default judgment against the 2nd Defendant, is varied in accordance with Rule 42.10, to omit order number 2;*
2. *Leave to appeal granted to the Claimants;*
3. *2nd Defendant/ Applicant Attorneys-at-Law to prepare, file and serve the orders herein;*
4. *No Order as to costs.*