



[2020] JMSC Civ 68

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017 HCV 00742

BETWEEN	VANESSA COOPER	CLAIMANT
A N D	RICARDO AUSTIN	1ST DEFENDANT
A N D	MARCIA WHITTER	2ND DEFENDANT

IN CHAMBERS

Ms Tashawna Grannum instructed by Hart Muirhead and Fatta Attorneys-at-law for GK General Insurance Company Limited

Mr Everol McLeod instructed by Kinghorn and Kinghorn Attorneys-at-law for the Claimant

HEARD: 19 February 2020 and 27 February 2020

Civil Procedure - Application to set aside substituted service - Civil Procedure Rule 11.18

MASTER T. MOTT TULLOCH-REID

BACKGROUND

[1] The Applicant, GK General Insurance Company Limited has applied to the Court by way of Notice of Application for Court Orders filed on March 13, 2019 for an order that the order of Master Thomas (as she then was) granted on October 25, 2017 to dispense with personal service of the initiating documents on the 2nd Defendant and serve them on the Applicant instead be set aside. The basis on which the order is being sought was that the Applicant had not insured the 2nd

Defendant since 2014 and it was now unaware of her whereabouts. Since it has no relationship with the 2nd Defendant it is unable to bring the contents of the claim to the 2nd Defendant's attention and she would be unfairly prejudiced if the order is not set aside. The application is also grounded on the fact that the Court has set aside the Order for alternate service on the Applicant in the related claim **2016 HCV 03519 Bradley Cooper v Ricardo Austin and Marcia Whitter**, which arose out the same accident. I will say initially, that the outcome of that application will have absolutely no bearing on the decision made in this application, as that application was not before me and I am only looking at the application, evidence and submissions that are presented to me in the case that I have been asked to oversee.

[2] The Applicant did not in the application ask for an extension of time to make the application or for permission to intervene in the proceedings. These are both necessary steps in applications of this kind. CPR 11.16 provides that

“(1) a respondent to whom notice of an application was not given may apply to the Court for any order made on the application to be set aside or varied and for the application to be dealt with again.

(2) A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent” (my emphasis).

The application does not seek an extension of time to make the application. The Applicant however, at the hearing of the application, made an oral application seeking the extension of time to make the application and this was allowed as the Claimant/Respondent offered no objection. However, the applicant did not ask to intervene in the proceedings and without that permission it has no *locus standi* in the proceedings. The Respondent's attorney-at-law raised no objection to the Applicant's application. In any event, my decision would have been the same even if the applicant had *locus standi* but I must warn counsel for the Applicant to avoid such oversights in the future.

[3] The Application is supported by the undisputed evidence sworn to by Arlene Williams, the Senior Legal Counsel at GK General Insurance Company Limited.

The Affidavit was filed on March 13, 2019. She depones to the fact that the 2nd Defendant's motor vehicle was involved in an accident on October 18, 2014. The motor vehicle was insured in June 2014 and cancelled in October 2014, the same month of the accident. The Applicant last had contact with the 2nd Defendant in May 2015 via a telephone conversation in which she updated her telephone contact information. Notice of Proceedings concerning the claimant's claim was served on the Applicant in March 2017 the same month and year that the Claim Form and Particulars of Claim were filed.

[4] Paragraphs 14 and 15 of Ms Williams' affidavit are confusing because they refer to receiving the notice of the claim in 2015, contacting the 2nd Defendant in 2016 but not obtaining a response from her. The dates are confusing because the claim and notice of proceedings were filed in 2017. I am assuming that she means that she received notice of the claim in without prejudice correspondence with the Claimant's attorneys-at-law. In paragraph 17 of Ms Williams' affidavit, the evidence is that 3 letters were sent to the 2nd Defendant between November and December 2014 and they were returned uncollected from the post in January and March 2015. Ms Williams had indicated previously that the company last communicated with the 2nd Defendant in May 2015. If the letters were returned uncollected from the post office in January and March 2015, why is it that in May 2015 when the 2nd Defendant contacted them, they did not seek to obtain information about her current whereabouts? I believe that would have been the prudent thing to do especially since it appears that the Applicant was aware of the claimant's claim and confirmed in paragraph 14 of Ms Williams' affidavit that they had received notice of the said claim.

[5] I note the efforts that were made by the Applicant in locating the 2nd Defendant. Were these efforts reasonable efforts? The August 17, 2016 file note suggests that the 2nd Defendant was still in the island. That would have been before Master Thomas' order was made or served on the Applicant. The letter from Actar Investigators dated November 16, 2017 sets out the attempts that would have been made to locate the 2nd Defendant subsequent to the granting and presumable

servicing of the Order of Master Thomas. Three visits to the 2nd Defendant's address, bore no results. Mr Ian Blackwood said when he went to the premises nobody was home. What time did Mr Blackwood attend on the premises? He does not say. That information would certainly have been helpful as it would make it clear that at the time that he went it would have been more likely than not that the 2nd Defendant or anyone at all who could provide him with information as to the 2nd Defendant's whereabouts would be at home. Was it a weekday that he went to the premises? If yes, at what time of the day? Did he go in the middle of the day when it was likely that the occupants of the house would be away from home attending to duties at work or at school? His letter does not assist. However, the Affidavit of Jermaine Smith, the Claimant's process server, makes it clear that in 2017 when he attempted service, the 2nd Defendant had vacated the premises and it was occupied by a new tenant. I suspect that that remained the case when the investigator visited the premises not long after. Mr Blackwood from the investigating company then reports that he spoke to a neighbour, Ms Marcia Bartley, who reported that the 2nd Defendant had migrated to the United States of America. Where did she migrate to? Was that question asked of Ms Bartley? Was Ms Bartley able to provide a current address or contact information for the 2nd Defendant? Was this information asked of her? Can the investigator rely on Ms Bartley's word that the 2nd Defendant had indeed migrated? Why would the investigator form that opinion that he could rely on Ms Bartley's assurances? Was Ms Bartley able to provide any information about how to contact the relatives or friends of the 2nd Defendant who would perhaps be in a better position to assist with locating the 2nd Defendant? All that detail would have been helpful to the court and in my opinion are not unreasonable if an investigator is properly investigating the whereabouts of someone pursuant to an order of the Court.

[6] Mr McLeod argues that the Applicant's investigator took the same steps the Claimant's process server took and expected to achieve a different result. He submits further that the investigator should have done more. The Claimant's process server's attempts to personally serve the initiating documents are set out in his Affidavit filed on June 2, 2017. He reports that on one of his visits to the 2nd

Defendant's address he was told that she had moved and the premises were occupied by a new tenant. He was also told by the 2nd Defendant's friend that she had migrated. The same questions that I set out above, which the investigator could have asked while conducting his investigations, are the same questions the process server could have asked of the 2nd Defendant's friend. He did not ask them. It is the Claimant's responsibility to take every step to personally serve the Defendant. He must exhaust every step. It is when those steps are exhausted that he approaches the Court for an order for specified service to be made because he has done all he can and he can do no more. I have observed that in making applications for specified service, the evidence contained in affidavits in support are very blasé. Generally speaking, counsel making the application seem to form the view that the orders sought will be automatically granted even though the evidence in support is weak and does not reveal the reasonable efforts made to personally serve the claim form and particulars of claim. Counsel should reconsider this tendency especially in light of the several applications being made by insurance companies to set aside orders made for specified service and taking into account that these applications are often times made after the limitation period on the cause of action would have already expired so precluding the Claimant from bringing a new claim.

[7] Notwithstanding the steps the Claimant's process server could have taken, there is now an order of the Court for the documents to be served on the Applicant and the intention is for the Applicant to bring them to the attention of the 2nd Defendant. Were they able to do so? They say they were not. The question I must answer is did the Applicant do all it could reasonably do to find out where its insured was so that it could bring the initiating documents and the order of Master Thomas to the attention of the 2nd Defendant. I do not believe they did. I believe they could have extended themselves a little more and had they done so, and informed the court of those unsuccessful efforts in affidavit, I would feel more constrained to set aside the order of Master Thomas made on October 25, 2017.

[8] In my opinion, it is certainly not enough to just make an attempt to locate. Reasonable attempts must be made and if those reasonable attempts are taken but the insurance company is still unsuccessful in finding the person, then and only then should it return to the Court and ask for the order to be set aside. I am supported in this position by Master Thomas, as she then was, in the case of **Jephtah Davis v Roy Marshall [2017] JMSC Civ 161**. I am grateful to Ms Grannum and Mr McLeod who both referred me to the decision. I note in particular paragraph 19 which reads

“Where service is effected on the insurers of the defendant, once it is established that the insurers have made all reasonable efforts to bring the contents of the claim form and particulars of claim to the attention of the Defendant and has failed, then the alternative service should be set aside.”

[9] I do not agree with Ms Grannum’s submission at paragraph 18 that the returned envelopes support the Applicant’s assertion that it is not able to bring the contents of the documents to Ms Whitter’s attention. There is now no guarantee that serving documents by registered post will bring documents to the attention of persons who are expecting to be sued and who will therefore simply not collect the mail. A more direct approach would be required, which is why I believe the investigator was hired. Based on the reasons given above, I am not of the view that the investigator’s attempts were reasonable in the circumstances. More could have been done without those additional efforts becoming onerous, unjust or prejudicial for the investigator or the Applicant.

[10] I therefore order as follows:

- a. The order of Master Thomas made on October 25, 2017 dispensing with personal service of the claim form and particulars of claim and all other documents on the 2nd Defendant and granting permission for the said documents to be served on GK General Insurance Company Limited at 19-21 Knutsford Boulevard, Kingston 5 stands.
- b. The Applicant is to make additional efforts to locate or determine the whereabouts of the 2nd Defendant.

- c. The Applicant is to pay the Claimant costs in the application in the amount of \$20,000.00.
- d. The Applicant's attorneys-at-law are to file and serve the Formal Order.
- e. Leave to appeal is granted.