[2017] JMSC Civ 161

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV03802

BETWEEN	**JEPHTAH DAVIS**	**CLAIMANT**
AND	**ROY MARSHALL**	**DEFENDANT**

Ms. Suzette Burton-Campbell instructed by Burton-Campbell & Associates for the Applicant.

Ms. Sudine Riley instructed by Kinghorn & Kinghorn for the Respondent.

Heard 18th September 2017 and 24th October 2017

SUBSTITUTED SERVICE – APPLICATION TO SET ASIDE SUBSTITUTED SERVICE – DEFAULT JUDGMENT – INSURER SAYING THEY ARE UNABLE TO CONTACT INSURED – TESTS TO BE APPLIED

MASTER A. THOMAS (AG)

Background

[1] This is an application by Advantage General Insurance Company to set aside an order for substituted service and default judgment. The Claimant, Mr. Jephtah Davis, claims against the Defendant, Roy Marshall, damages in negligence for personal injuries. The substance of his claim is that on the 28th of August 2006 he was a passenger in a motor vehicle registered 7775 (EK) travelling along the

Spanish Town By Pass when motor vehicle registered PB 6031, owned by the Defendant, crashed in the rear of the motor vehicle in which he was travelling.

[2] He alleges that he received injuries to his head, moderate pain in his neck, tenderness in his left shoulder, moderate spasm and tenderness in his lower back.

[3] On the 20th of May 2013, the Claimant made an application for substituted service for service to be effected on Advantage General Insurance Company, who was the insurer of the Defendant at the time of the accident. The grounds of application state:

(i) The Claimant could not locate the Defendant in order to effect personal service on him.

(ii) Service on Advantage General Insurance Company was likely to bring the contents of the Claim Form and Particulars of Claim to the attention of the Defendant.

[4] On the 8th of December 2014, an order for substituted service on Advantage General was made by Master Bertram Linton (as she was then). On the 14th of April 2015, service was effected on Advantage General in accordance with the order for substituted service made on the 8th of December 2014. On the 22nd of May 2015, this application was filed by the Applicant, Advantage General. The hearing was set for the 13th of April 2016. On the 8th of July 2015, Judgment in Default was entered in favour of the Claimant.

[5] On the 27th of August 2015, another application was filed along with an Acknowledgment of Service essentially asking for the same relief. No hearing date was indicated in the notice of that application.

[6] On the 13th of April 2016, the matter that was filed on the 22nd of May came up for consideration on the scheduled date. There were several adjournments. The matter is now being heard.

[7] The Applicant is seeking the following orders;

(i) Permission to be heard.

(ii) Extension of time to file this application.

(iii) The Order for substituted service made by Master Bertram Linton on 8th December 2014 be set aside.

(iv) Service of the Claim Form and Particulars of Claim under the order for substituted service be set aside.

(v) That all proceedings flowing from the service of the document be set aside.

(vi) Cost of the application be granted to the Applicant.

The main ground of their application is that they are unable to locate the Defendant to bring the Claim Form and Particulars of Claim to his attention.

Submissions

Submission by Ms Suzette Campbell on behalf of the Applicant

(i) The essence of the order for substituted service is that the Claimant was permitted to serve the Claim Form and Particulars of Claim on the insurers.

(ii) The basis of the grant of that application is that the insurers were in a position to bring the documents to the attention of the Defendant.

(iii) The affidavit of Ms Nesbeth sets out the efforts made and indicates to the court that the Defendant has not been found.

(iv) The Applicant employed an investigator to locate the Defendant and the last thing he was told was that the Defendant is off the island. The

essence of the application is that the Claim Form and Particulars of Claim have not been brought to the attention of the Defendant.

(v) Once it is shown that the insurers took reasonable steps to locate the Defendant without success then the order should be set aside. (In support of this point, she relies on the authority of the **Insurance Company of The West Indies Ltd and Shelton Allen v Mervis Nash and Ors** [2011] JMCA Civ 3.)

(vi) The issue of service is crucial. The matter ought not to go further if it is shown that the person was not served. Service should be personal service unless there is good reason not to do so. It is unfair for the matter to proceed when it has not been brought to the attention of the Defendant. (She relies on **Taylor v. Metropolitan Management** [in the Supreme Court of Jamaica] 2007 HCV 0938; and **Tarzan Mighty v Michael Wilson and Ors.** [In the Supreme Court of Jamaica] CL 1999 M188.)

(vii) The delay was based on the steps the Applicant had to take to locate the Defendant.

Submissions on behalf of the Respondent

[8] Ms Riley gave very lengthy written submissions. However, I will seek to highlight those that are relevant to the issues that I must determine.

(i) The Applicant was made aware of this Claim since 2012; it is now unreasonable to advance the position that they now cannot locate the Defendant.

(ii) The fact that the insurers upon whom an order was validly made cannot find their client does not render the order in itself invalid. The Applicant must satisfy the court that the efforts made to locate the insured have been so comprehensive that there is no way that the contents of the

Claim Form and Particulars of Claim can be brought to the attention of the Defendant.

(iii) The investigator visited the known address of the Defendant and was advised by a person who identified herself as the Defendant's wife that the Defendant was out of the jurisdiction without a specific date of return.

(iv) The court must therefore look carefully at what it means to bring a Claim to the attention of a Defendant or in the alternative what reasonable steps could be taken to follow up on the information garnered on the visits made.

(v) The Affidavit of Ms. Nesbeth is wanting at the least and insufficient at the most. The information that was obtained could have permitted the investigators to explore other methods of locating the Defendant such as asking persons in and around that address.

(vi) Having ascertained from the Defendant's wife that he was out of the jurisdiction at the very least, further follow up visits could have been made.

(vii) In all the circumstances, the efforts made by the Applicant were grossly insufficient.

(viii) Delay in such proceedings breeds prejudice. The application to set aside an order, for which notice of the application was not given to the Respondent as required by **Rule 11.16 (2)** must be filed 14 days after the date on which the order was served on the Respondent. The nature of this Rule is mandatory. The application ought to be refused. (She refers to **Moranda Clarke v Dion Marie Godson and Donald Ranger** Claim No. 2013 HCV 03117.) These timelines are critical in determining the instant application. Particularly in the context of the claim being statute barred as at August 2012.

(ix) To allow such an application to succeed cannot be in the best interest of justice and the furtherance of the overriding objective of the Rules. No explanation or evidence has been provided for the delay in the filing of the application. This is a further basis for the denial of the application.

(x) This application should be refused in the interest of justice. AGIC has failed to satisfy the requirement outlined in the **Shelton Allen** case.

(xi) Having been served with the Formal Order, the Claim Form and Particulars of Claim in April 2015, AGIC has done nothing for a period of one year. No explanation has been given for this inordinate delay. This delay will result in irreparable damage to the Claimant, if the court were to accede to this very late application, as not only would the Claim Form have expired but the limitation period to pursue this matter would also have expired.

Issue

[9] The issues which I have to address are:

(i) Whether the failure of the Applicant to file this application within the time mandated by the rules is a bar to them being heard.

(ii) Whether service of the Claim Form and Particulars of Claim on the Applicant was likely to enable the Defendant to ascertain the contents of the documents.

The Law

The **Civil Procedure Rules** (hereinafter referred to as the Rules) set out the procedure for applying for the setting aside of an order made on an application without notice. The procedure is governed by **Rule 11.16**.

Rule 11.16 (1) states,

"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."

Rule 11.16 (2) states,

*"A respondent **must** make such an application not more than 14 days after the date on which the order was served on the respondent."*

Part 5 of the Rules stipulates the conditions to be satisfied in order for service alternative to personal service to be deemed good service.

Rule 5.13 reads:

"(1) Instead of personal service a party may choose an alternative method of service.

(2) Where a party -

(a) chooses an alternative method of service; and

(b) the court is asked to take any step on the basis that the claim form has been served, the party who served the claim form must file evidence on affidavit proving that the method of service was sufficient to enable the defendant to ascertain the contents of the claim form.

(3) An affidavit under paragraph (2) must -

(a) give details of the method of service used;

(b) show that -

(i) the person intended to be served was able to ascertain the contents of the documents; or

(ii) it is likely that he or she would have been able to do so;

(c) state the time when the person served was or was likely to have been in a position to ascertain the contents of the documents; and

(d) exhibit a copy of the documents served.

Rule 5.14(1)(2) empowers the court to make order for service by specified method. It provides that:

"(1) The court may direct that service of a claim form by a method specified in the court's order be deemed to be good service

(2) An application for an order to serve by a specified method may be made without notice but must be supported by evidence on affidavit-

(a) specifying the method of service proposed; and

(b) showing that that method of service is likely to enable the person to be served to ascertain the contents of the claim form and particulars of claim."

Analysis

Whether the failure of the Applicant to file this application within the time stipulated by the Rules is a bar to them being heard.

[10] The use of the word **must** in **Rule 11.16(2)** does suggest that the Rule is meant to be mandatory.

A litigant is therefore expected to strictly comply with the Rules. This is in keeping with the general thrust of the Rules to deal with cases expeditiously.

However there is provision in the Rules which empowers the court in the appropriate circumstances to grant extension of time where the Applicant fails to comply with the time stipulated by the Rules.

Rule 26.1(2) (c) provides that;

> *"Except where these Rules provide otherwise, the court may extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed."*

[11] In **Moranda Clarke v Dion Marie Godson and Donald Ranger** [2015] JMSC Civ 48, the learned Master, Mrs. Bertram Linton (as she then was), had to address this very issue. In that case an application was made by the insurers seeking an order from the court to set aside the order for the substituted service which was effected on them.

Despite the fact that she found that ***Rule 11.16 (2)*** "is meant to be mandatory", in paragraph 18 of her judgment, she stated,

> *"The Rules however also under Rule 26.1(2) correspondingly provides for the extending of the time for such an application in the exercise of the court's discretion and this provide some flexibility to ensure that justice is done."*

Therefore, the fact that the Applicant has failed to comply with the timeline to file this application is not a bar to them being heard.

[12] At paragraph 10 of her Affidavit, Ms. Nesbeth has indicated that the reason for the delay is due to the efforts the Applicant made to locate the Defendant. I accept that as a reasonable explanation for the delay. I am mindful of the fact that the Applicant is not the actual Defendant in the claim. Additionally, judgment in Default was entered on the premise that the contents of the afore-mentioned documents came to the attention of the Defendant and he failed to file a Defence. The Applicant is seeking to be heard on the basis that they were not able to bring the contents of the Claim Form and Particulars of Claim to the attention of the Defendant. I believe that it is just to give them an opportunity to be heard with regard to the issue of service. This would be in compliance with the Rules. (See **Rule 1.1(1)**). That is "enabling the court to deal with cases justly". The court has to ensure that cases are dealt with not only expeditiously but also fairly. (See **Rule 1.1 (2) (d)**.) Therefore, despite the fact that they have failed to apply within the time stipulated by the Rules, I exercise my discretion in favour of the Applicants; granting the extension of time and allowing this application to be heard.

<u>Whether Service of the Claim Form and Particulars of Claim on the Applicant was likely to enable the Defendant to ascertain the contents of the documents</u>

[13] On an examination of the Rules, it is clear that alternative service does not require personal service on the Defendant. What must be ensured it that the contents of the documents are likely to come to the attention of the Defendant. Counsel for the Applicant contends that service should be personal unless there

is good reason not to do so. In support of this point she relies on **Tarzan *Mighty v Michael Wilson and Ors.*** *(In the Supreme Court of Jamaica* CL 1999 M 188). Skyes J in that case did say that;

> *"The issue of service is crucial. The matter ought not to go further if it is found that the person was not served . . . ."*

[14] It should be noted that that case had to deal with the issue of personal service. It was the personal service that was challenged by the Applicant/Defendant. The issue was one of credibility between the process server of the Claimant and the Applicant\Defendant. In that case there was evidence on which the judge could and did find that the Applicant was not served. The Claimant's/Respondent's process server, Mr. Lawson, alleged that he served Mr. Wilson, the Applicant/Defendant at his house in Above Rocks on the 17th September 1999. However, Mr. Wilson alleged that he was never served. Sykes J at paragraph 3 said;

> *"It is significant to note that during cross examination Mr. Lawson testified that he could not recall where in Above Rocks Mr. Wilson's house was. He could not recall the day of the week he served Mr. Wilson. He was unable to describe the house at which he saw Mr. Wilson. To put it mildly, Mr. Lawson was unable to say anything further than that he served Mr. Wilson and Mr. Marshall."*

[15] Counsel for the Applicant is also relying on **The Insurance Company of The West Indies Ltd and Allen vs Mervis Nash and Ors** [2011] JMCA Civ 33. In that case there was an order for alternative service on The Insurance Company of The West Indies (ICWI). They sought to have the service set aside on the basis that they were not able to serve the documents on the Defendant. They submitted that the Defendant was in breach of his driver's policy and not entitled to indemnity under the insurance policy. They argued that this fact was known to the attorney for the Claimant before the application for substituted service. They further indicated to the court that despite writing to him, they heard nothing from him. Therefore, they were unable to accept service, as they had no knowledge of his current address and there was no evidence that if the Claim Form was served

on them, the 3rd Defendant would have been able to ascertain the content of the document or that it was likely that he would have been able to do so.

[16] Morrison J, at paragraph 35 said;

> *"It appears to me from the language of **Rule 5.13** to be unarguably clear that the option given by the Rule to the Claimant to choose an alternative method of service is expressly subject to the Claimant being able to satisfy the court on affidavit either that the Defendant was in fact, 'able to ascertain the content of the document' **(Rule 5.13 (3)(b)(1)** or that 'it is likely that he or she would have been able to do so' (**Rule 5.13 (3)(b)(2)**."*

He further stated at para 37;

> *". . . in order for the court to sanction an alternative method of service of the Claim Form adopted by the Claimant pursuant to that Rule it must be clearly shown on affidavit and the court must be satisfied that the document is likely to reach the Defendant or come to his knowledge by that method."*

[17] The other authority on which counsel for the Applicant seeks to rely is **Loveleen Morgan-Taylor v Metropolitan Management Transport Holdings Limited** (in the Supreme Court of Judicature of Jamaica) *Claim No. 2007 HCV 0938*. This was a matter that was concerned with service on the Defendant who is a limited company. The Claimant alleged that service was effected by registered post to the registered office of the company Metropolitan Management Transport Holding Limited at 36 Trafalgar Road, Kingston 10, in accordance with **Rule 5.7**. This Rule provides that:

> *"Service on a limited company may be effected -*
>
> > *(a) by sending the Claim Form by …. prepaid registered post ….addressed to the registered office of the company …."*

Rule 5.19 further provides that;

> *"(1) A claim form that has been served within the jurisdiction by prepaid registered post is deemed to be served, unless the contrary is shown, on [21] days after the date indicated on the Post Office receipt."*

The company filed no Acknowledgement of Service or Defence, and in light of that fact, Interlocutory Judgment in Default of Acknowledgement of Service was entered.

[18] They sought to have the judgment set aside denying that the Claim Form was ever served and that the company intended to defend the Claim. In that case, there was evidence on affidavit from the Postmaster General. That evidence stated that the records at the post office revealed that the letter was unclaimed, was returned to the sender, and someone actually signed as collecting the letter and the contents on behalf of the attorney-at-law for the Claimant. On that basis, Lawrence-Beswick J at paragraph 11 found that there was "evidence that that letter was not collected by Metro." She therefore found that, "on a balance of probabilities the Claim Form and Particulars of Claim were not in fact served on Metro".

[19] The principles of law to be gleaned from these authorities are;

(i) Where a method of alternative service is employed by the Claimant the court should be satisfied that the contents of the Claim Form and Particulars of Claim are likely to come to the attention of the Defendant. Once it is not so satisfied the order for alternative (substitute) service and any consequential order and or judgment should be set aside.

(ii) 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.

[20] However the present case can be distinguished from **the Insurance Company of the West Indies Ltd** v **Allen and Ors** and **Loveleen Morgan-Taylor v Metropolitan Management Transport Holdings Limited** (Supra). In both these authorities, there was clear evidence that;

(i) The contents of Claim form and Particulars of Claim did not come to the attention of the Defendant;

(ii) The insurers, in doing all that was reasonable, could not bring the contents of the Claim Form and the Particulars of Claim to the attention of the Defendant.

[21] In the present case I find that there is evidence to the contrary. There is sufficient evidence for me to form the impression that the contents of documents served on the insurers were likely to come to the attention of the Defendant.

[22] In paragraph 7 of her Affidavit, Ms. Nesbeth indicates;

> *"That copies of the Claim Form and Particulars of Claim were sent by registered mail to the Defendants known address. To date the Defendant has not responded and neither was the package containing the documents returned to the company."*

The fact that the Defendant has not responded or made any contact with the Applicant in this case is not conclusive evidence that the contents of the Claim Form and Particulars of Claim sent by registered post were not brought to the attention of the Defendant. The fact that the documents were not returned "unclaimed" is evidence from which I form the opinion that it was claimed or received by someone. There is other evidence which supports this position. The report of the investigator for the Applicant indicates that there were persons living at the Defendant's address who are closely connected to him. I am therefore of the opinion that they were in a position to receive the letters sent by registered post.

[23] There is also evidence that at least one of those persons was acting as agent of the Defendant and therefore would be in a position to bring the contents of the documents to the attention of the Defendant.

In his report, the investigator, Delona Davis indicated that he went to the address of the Defendant on 11th May 2015. He stated that;

> *"We located his home and spoke with his father, Roy Marshall Senior, who informed us that the insured was not at home and we could leave the documents with him because he is the one that handles his son's business."*

The only reasonable inference I can draw from this is that Mr. Marshall Senior, whether formally or informally, was acting in the capacity as agent for the Defendant, Mr. Marshall (Junior). He was therefore in a position to bring the contents of the Claim Form and Particulars of Claim served by registered post to the attention of the Defendant.

[24] I will now examine another authority which addresses the responsibility of the insurers when alternative service is effected on them. This authority is **British Caribbean Insurance Company Limited v Barrett (David) and Others** [2014] JMCA App 5.

In that case, there was an order for substituted service on British Caribbean Insurance Company Insurers for the Defendants. The insurers, British Caribbean Insurance Company (BCIC) applied to have the substituted service set aside on the basis that they made all efforts to locate the Defendants without success. The insurers argued that they sent letters to the addresses that they had for the Defendants, Messrs Ruddock and Evans, and made telephone calls to the numbers that they had for Mr. Ruddock. They asked the court to find that they had made all reasonable efforts to bring the Claim to Mr. Ruddock's attention.

Efforts in that case

[25] The evidence in that case was that when it was served with the Claim Form, BCIC no longer had a current policy of insurance with the Defendant. The letters that they had sent out to both men had been returned stating the persons were not known at the address. One letter was addressed to each man. Despite the fact that there were two addresses on each letter, one at 18 Helena Crescent, Patrick Gardens, and another at 50 Dumbarton Avenue, Kingston 10, the envelopes were sent only to the Dumbarton Avenue address. No evidence was

presented as to whether the letters were mailed to the Helena Crescent address; that is the home of Mr. Ruddock, and if so, what were the results of those efforts.

[26] His Lordship, Mr. Justice Brooks, did say at paragraph [22] that;

> *"Another glaring omission in the evidence concerning BCIC's attempt to contact Mr. Ruddock is that it made no effort to serve him personally with a letter. Despite having determined that both Mr. Ruddock and Mr. Evans 'worked at premises located at 50 Dumbarton Avenue', there is no evidence of any effort to speak with them personally there, or to personally deliver a letter to either of them at that address."*

[27] A careful examination of the arguments in this case indicates that it is not saying that where alternative service is ordered to be effected on the insurers of the Defendant, the documents must be handed directly to that Defendant. In the circumstances of that case. His Lordship, Mr. Justice Brooks, did comment on the lack of any evidence of any attempts made to mail the documents to the other known address of the Defendants. He remarked that there was no attempt to serve the other Defendant by sending the letter to this mailing address. This was in light of the fact that there was clear evidence that the contents of documents already sent by post were not likely to come to the attention of the Defendants as the letters were returned unclaimed.

[28] Additionally, the insurers had information with regard to the Defendants' place of work, hence his enquires as to why there was no attempt to serve them personally. In his conclusion, he stated that;

> *"In the circumstances it cannot be said that the learned Master was obviously wrong in finding that BCIC had not made all reasonable efforts to contact Mr Ruddock".*

Therefore, the principle I extrapolate from this case is that when alternative service is effected on insurers, they are to make reasonable efforts to located the Defendants. They must do all that is reasonable to bring the contents of the documents to the attention of the Defendants.

[29] On the evidence before me, even if I am wrong in finding that the contents of the Claim Form and Particulars of Claim sent by the Applicants by registered post

were likely to come to the attention of the Defendant, I find that Advantage General could have gone further in their efforts to contact the Defendant, Mr. Marshall. They have given no explanation as to why the Claim Form and Particulars of Claim were not left with Mr. Marshall (Senior) the father of the Defendant who indicated that he was the one handling his son's business and was willing to receive it. In response to Mr. Marshall's (Senior) request, all they have said is; "We did not comply with his request."

There is no indication as to why they did not comply with the request. They could have left the documents and do follow up checks. In light of that, they would not have done all that was reasonable to bring the contents of the Claim Form and Particulars of Claim to the attention of the Defendant. Therefore, in all the circumstances, I deem alternative service on Advantage General Insurance Company as good service.

[30] Having found that service on the Applicant was good service, I must now determine whether there is basis for me to set aside the Judgment entered in Default of Defence.

Rule 13.2 outlines the circumstances in which the court must set aside a Judgment entered in Default of Defence. It states;

> *(1) "The court must set aside a judgment entered under Part 12 if the 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".*

[31] In light of the fact that this application was filed the 22nd of May and Judgment in Default was entered on the 8th of July, it may be argued that conditions at **Rule 12.5 (e)** have not been satisfied. However this application was for the extension of time for this application to set aside substituted service and other

consequential orders. There is no application for an extension of time to file a Defence. Therefore, at the time the Default Judgment was entered, there was no pending application for an extension of time to file a Defence. In light of this fact, there is no basis to set aside the Default Judgment under **Rule 13.2(1)**.

[32] **Rule 13. 3** deals with the circumstances in which a court **<u>may</u>** set aside a Default Judgment. **Rule 13.3 (1**) states,

> *"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."*

Rule 13.3 (2) states,

> *"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*

Rule 13.4 outlines the procedure to be followed in an application to vary or set aside Judgment entered in Default of Defence.

Rule 13.4 (2) and **(3)** state,

> *(2) The application must be supported by evidence on affidavit.*
>
> *(3) The affidavit must exhibit a draft of the proposed defence.*

There is no compliance with **Rule 13.3** and **Rule 13.4** in relation to the setting aside of the Judgment entered in Default of Defence. There is no draft Defence before me. The affidavit evidence does not disclose any reason for the failure to file a Defence, neither does it disclose any Defence. Therefore, there is no evidence before me which will allow me to make a determination as to whether

the Defendant has any reasonable excuse for failing to file a Defence or good prospect of success.

Conclusion

[33] There is sufficient evidence for me to arrive at the conclusion that the service of The Claim Form and Particulars of Claim on the Applicant is likely to bring the contents of the documents to the attention of the Defendant. Therefore, I deem the service of the Claim Form and Particulars of Claim on the Applicant good service.

Order

1. The application is denied.

2. Cost to the Claimant to be agreed or taxed.

3. Leave to appeal granted.