IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016HCV04073

BETWEEN	**STEVE DOUGLAS**	**APPLICANT/DEFENDANT**
AND	**PATRICIA ARMSTRONG**	**RESPONDENT/CLAIMANT**

IN CHAMBERS

Mr. Clifton Campbell for the Applicant instructed by Archer, Cummings and Company

Miss Tiffany Barrett for the Respondent instructed by Nigel Jones and Company

December 3, and 18, 2020 and January 29, 2021

Application to set aside default judgment – Rules 13.2 and 13.3 of the Civil Procedure Rules 2002 (CPR) – The effect of a failure to comply with rules 30.2 and 30.5(1) of the CPR – Whether to set aside the default judgment and order a trial with the counterclaim.

REID J (AG)

[1] Mr. Steve Douglas (the Applicant) is seeking to set aside a default judgment that was entered against him, set aside the service of the Claim Form and Particulars of Claim and all subsequent process arising therefrom. In the alternative, he seeks a stay of execution of that judgment pending a trial of his counterclaim. He has sought these orders on the basis that he was not served with the claim form and particulars of claim in the matter; the affidavit filed proving service of these

documents was defective; and that he has a good arguable defence with a realistic prospect of success.

Background

[2] Miss Patricia Douglas (the Respondent) alleges in the affidavit of service of Mr Hubert Jones, filed on March 13, 2017, that the following documents (filed September 28, 2016) was served on the Applicant at his business place on November 2, 2016: a sealed copy of the claim form with prescribed notes for Defendants, acknowledgment of service of claim form, defence, application to pay by instalments and a particulars of claim.

[3] On November 22, 2016, judgment in default of acknowledgment of service was entered against the Applicant as follows:

1. The total sum of $1,799,432.85, in addition to $12,000.00 inclusive of attorneys fixed costs on the issue, attorney's fixed costs to enter judgment, and court fees on claim form, to be paid forthwith, in full, as per particulars set out in the request for default judgment.

2. Interest at a rate of 6% per annum on $1,799,432.85 and 6% per annum on $12,000.00 from the date of judgment to payment.

[4] The Applicant , thereafter, filed an application on October 3, 2017 in which he sought the following orders:

1. There be a stay of execution of the default judgment herein.

2. Service of the claim form and the Particulars of Claim on the Defendant and all subsequent process herein be set aside; and/or alternately
3. The default judgment entered herein on the 22nd day of November, 2016 be set aside.
4. The Defendant be granted leave to file his defence within 14 days of the date hereof.
5. Such other and/or further relief as this Honourable court deems fit.

[5] The grounds on which the Applicant is seeking the orders are as follows:

a) The Applicant was never served with the Claim form nor the Particulars of Claim herein.
b) The Applicant was not given any opportunity to be heard by the Court on his defence.
c) The Applicant has a good and arguable defence with a realistic prospect of success.

[6] The Applicant in his defence has set up a counter-claim, and further argues that there should be a set off of US$14,000.00 which is owed to him by the Respondent.

Affidavit of service and evidence of Mr. Hubert Jones

[7] Mr. Hubert Jones, a process server, deponed to an affidavit of service. He also testified to the contents of his affidavit and was extensively cross-examined by counsel for the Applicant, Mr. Clifton Campbell.

[8] Mr Jones stated that he had been given two addresses at which he could locate the Applicant: a business place at Shop # 13, 98 Molynes Road, Kingston; and a residence in Meadowbrook Estate. He stated that he had visited the residence at Meadowbrook Estate on several occasions, but the Applicant was never present and it was always locked up. He said that he had also visited the business place at Molynes Road on several occasions, and it had always been closed until November 2, 2016, when he personally served the Applicant with the following documents that had been filed on September 28, 2016: claim form with prescribed notes for Defendants, acknowledgment of service of claim form, defence, application to pay by instalments and the particulars of claim. Although, Mr Jones could not recall the dates of his several visits to the two locations, he could recall the date when he had served the claim form and the supporting documents on the applicant.

[9] Mr Jones did not know the Applicant before. When he had visited Shop #13, 98 Molynes Road on November 2, 2016, the Applicant was the only person inside the

shop at the time. Mr. Jones spoke to the Applicant and asked him for “Steve Douglas”, and he (the Applicant) told him that he was Steve Douglas.

[10] Counsel for the Applicant, Mr. Clifton Campbell, suggested to Mr. Jones that he did not serve the Applicant with the claim form and supporting documents. Mr Jones resisted this suggestion, and indicated that he had told the Applicant, after giving him these documents, that he should take it to his lawyer. Mr. Jones said that he did not serve the Applicant with a judgment thereafter, but he had executed an order of seizure and sale upon him, about one year later. He denied that the first time he spoke to the Applicant was when he was executing the order for seizure and sale. He said that when he went back to execute the order for seizure and sale the Applicant was once again alone in the shop.

[11] Mr. Jones was questioned as to the particular reason he could remember all that had transpired with regard to the service of the documents on the Applicant. His response was that sometimes when a document was not served, he would make pencil jottings of non-service on the letter heads of the documents to be served, but once he had served the document, he would then dispose of these jottings. Thereafter, he would complete an affidavit of service. Despite counsel’s suggestions, Mr. Jones maintained his version of the events that had transpired when he visited Shop #13, 98 Molynes Road, and served the Applicant, firstly, with the claim form and its supporting documents, and secondly, with the order for seizure and sale. He said he served about five documents or less, each week, all over the island, and if it became necessary, he would recall matters relating to the service of a specific document. He said he recalled everything that happened in relation to the service of the documents on November 2, 2016.

The Applicant’s affidavits and evidence

[12] The Applicant filed two affidavits: the first, sworn to on September 28, 2017 and filed on October 03, 2017; and the second, sworn to on October 2, 2018 and filed on October 3, 2018. He stated that he is the owner of Shop #13, 98 Molynes Road.

The current opening hours are 10:00 a.m. to 4:00 p.m, however, in 2016, the opening hours were 10:00 a.m. to 5:00 p.m. The Applicant stated that he would be at Shop #13 from 10:00 am to 4:00 pm. He, however, admitted that there were times when he remained at the shop until after 5:00 pm, and he would be the person who would sometimes close the shop for the day.

[13] Although he could not account for his whereabouts on November 2, 2016 at 5:45 p.m, he denied that on that specific date and time, Mr. Jones handed him the claim form and other supporting documents at his shop. He denied identifying himself to Mr. Jones before he was handed the relevant documents. He agreed that he had said in his affidavit that he would pick up his wife at 5:00 p.m. on Wednesdays. However, he also agreed that some days, he would be late to pick up his wife, and some days he would be early.

[14] He insisted that on August 29, 2017, he did not receive a document marked "Interlocutory Judgment in Default of Acknowledgment of Service". When it was put to him that he had said otherwise in his affidavit, he pointed out that he had received a judgment and not a claim. He added that Mr. Jones did not give him the judgment on August 29, 2017. When asked who gave him the judgment, he responded that he could not recall. He, however, admitted that Mr. Jones did visit his premises.

[15] The Applicant stated that the only time Mr. Jones advised him to get an attorney-at-law, was when he served him with the judgment. He strenuously refuted a suggestion that the reason he was denying service of the claim form along with its supporting documents was because he realised that the Respondent had entered judgment against him.

[16] The Applicant said that he had two female sales representatives in 2016, and on the date Mr. Jones said he served him with the documents. He was asked to describe what happened when Mr. Jones came to execute the order of seizure and sale. He said that he was in the parking lot, just getting out of his car, and was

approaching his store. Mr Jones walked up to him, in the company of an unauthorised police officer, and said to him "If you open the door I'm going to lock you up because we own dis now". He had a short conversation with Mr. Jones, after which, Mr Jones then executed the documents on him. He then called his attorney-at-law.

[17] The Applicant admitted that the first time he was contacting his attorney-at-law about this case was when Mr. Jones came to him and showed him the order for seizure and sale. He agreed that his affidavit in this matter was filed on October 3, 2017 and the order of seizure and sale was filed on November 10, 2017 and signed December 5, 2017. He responded in the negative when asked whether the first time he was calling his attorney in relation to the matter was on August 29, 2017.

Issues, law and analysis

[18] Based on the evidence taken and submissions advanced before the Court, there seem to be four issues which arise for my consideration:

1. Whether the affidavit of service is valid having regard to rules 30.2 and 30.5 of the CPR
2. Whether the Applicant was served with the claim form and supporting documents?
3. Whether the default judgment should be set aside pursuant to rule 13.2 of the CPR
4. Should execution of the default judgment be stayed pending the trial of the Applicant's counterclaim?

Validity of the affidavit of service

[19] Counsel for the Applicant argued that the affidavit of service ought not to be admitted into evidence and relied upon by this court, as it failed to conform to rules 30.2 and 30.5(1) of the CPR.

Rule 30.2 is as follows:

"Every affidavit must -

(a) be headed with the title of the proceedings;

(b) be in the first person and state the name, address and occupation of the deponent and, if more than one, of each of them;

(c) state if any deponent is employed by a party to the proceedings;

(d) be divided into paragraphs numbered consecutively; and

(e) be marked on the top right hand corner of the affidavit with -

(i) the party on whose behalf it is filed;

(ii) the initials and surname of the deponent;

(iii) (where the deponent swears more than one affidavit in any proceedings), the number of the affidavit in relation to the deponent;

(iv) the identifying reference of each exhibit referred to in the affidavit;

(v) the date when sworn; and

(vi) the date when filed."

Rule 30.5(1) requires any document to be used in conjunction with an affidavit to be exhibited to it.

[20] Counsel also argued that the affidavit of service was filed late, on March 13, 2017, without any explanation. Counsel complained that the name of the Justice of the Peace is barely legible. He relied on **Sandra Moore v Patrick Cawley** (unreported), Supreme Court, Jamaica, Claim No. 2006HCV02776, judgment delivered on July 20, 2007, in support of his contention that given those defects, the Registrar should not have relied on the affidavit to enter judgment against the Applicant. He emphasised that the default judgment ought to be set aside as of right pursuant to rule 13.2 of the CPR.

[21] I have examined the case of **Sandra Moore v Patrick Cawley**, and found that it is distinguishable from the facts before this Court. In **Sandra Moore v Patrick Cawley**, the court determined that the affidavit which was filed in support of the

application to set aside the judgment only had a signature and a number. The signature was illegible. The name of the person administering the oath was not stated in full as required by the rule. The jurat did not indicate the place, parish or date when the document was prepared. Sykes J (as he then was) found that the document that was filed in support of the application to set aside the judgment, was not an affidavit within the meaning of Part 30, because it did not have a jurat as required by rule 30.4(1).

[22] In the case at bar, the affidavit is properly filled out. The jurat has been completed and the name of the Justice of the Peace "*Gregory Young*" is easily identifiable. I note that an affidavit of service marked "A" was filed with the request for default judgment. It was after the default judgment had been entered that the requisition was made to have the affidavit of service filed. However, the court finds that the affidavit does not comply with the formalities of rule 30.2(e) (i), (ii) and (iv) and rule 30.5(1). Does this make it inadmissible, thereby rendering the default judgment unsafe and liable to be set aside as of right? I do not think so. I believe that although the rules appear mandatory, the court can look at the overriding objective of the CPR (rule 1.1) which stated that the rules "*are [a] new procedural code with the overriding objective of enabling the court to deal with cases justly".*

[23] In **First Global Bank Limited v Orville Spence and Nadine Spence** [2018] JMCC Comm 45, the court considered whether the use of the word "must" in rule 5.13(4) was mandatory. Edwards J (as she then was) at paragraph [31] cited with approval a pronouncement from ***In Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales***, Volume 1, where Lord Woolf, in reference to the Civil Procedure Rules of England and Wales stated that:

> *"The new rules will have to be used in a different way; they will have to be read as a whole, not dissected and viewed word by word under a microscope. The new rules were deliberately framed so that the approach of those constructing them can be more purposive and less technical. It is the responsibility of the judiciary to make this system work."*

Edwards J also relied on Lord Denning in **James Buchanan & Co Ltd. v Babco Forwarding and Shipping (UK) Ltd**. [1977] Q.B. 208 where he opined at page 213 that:

> *"[under the purposive method of interpretation the judges] … go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit - but not the letter - of the legislation, they solve the problem by looking at the design and purpose of the legislature - at the effect which it was sought to achieve."*

[24] In **Medical and Immuniodiagnostic Laboratory Limited v Dorett O'Meally Johnson** [2010] JMCA Civ 42, the Court of Appeal made some strong remarks relying on **Hannigan v Hannigan and others** [2000] EWCA Civ. 159, in which procedural irregularities had occurred. The court permitted the case to proceed, and directions to be given in spite thereof, pursuant to the overriding objective as outlined in the English Civil Procedure Rules.

[25] "In the **Hannigan** case, the attorneys made numerous errors: they had commenced the claim using the wrong form; the statement of case was not verified by a statement of truth; there was a failure to include the Royal Coat of Arms; the first Defendant was inaccurately stated; one of the main witness statement was signed by the firm, rather than the witness personally, among several other errors. The judge acceded to an application to strike out the action and was extremely critical of the claimant's solicitors, particularly as there had been such a long preparation of judges and practitioners for the introduction of the new rules. His decision was overturned on appeal and the court made some crucial comments, which were so well said and which have general application. In finding that the manner in which the judge had exercised his discretion was seriously flawed, the court found that in his focus on the above matters, the learned judge "*lost sight of the wood from the trees*". The court mentioned that the Civil Procedure Rules were "*drawn to ensure that civil litigation was brought up to a higher degree of efficiency*". However, Lord Justice Brooks at paragraph 36 said the following:

> *"But one must not lose sight of the fact that the overriding objective of the new procedural code is to enable the court to deal with cases justly, and*

> *this means the achievement of justice as between the litigants whose dispute it is the court's duty to resolve…. CPR 1.3 provides that the parties are required to help the court to further the overriding objective, and the overriding objective is not furthered by arid squabbles about technicalities such as have disfigured this litigation and eaten into the quite slender resources available to the parties."*

[26] In **Medical and Immuniodiagnostic**, Phillips J.A stated at paragraph 43 that:

> *"...The CPR must not be used as an avenue for difficult stances to be taken and a means to increase litigation. Rule 1.2 of our CPR states clearly that the court should when interpreting the rules, seek to give effect to the overriding objective, and rule 1.3 states that it is also the duty of the parties to help the court to further the overriding objective."*

[27] Having considered those authorities, I believe that the absence of these markings on the affidavit was not fatal to the document being relied on by the Registrar. The document as it stood (without these markings) would not have negatively impacted the overriding objective. The affidavit, as filed, certainly, on the face of it, provided information indicating service of the claim form and supporting documents that was sufficient to alert the Registrar as to who it related to, and the claim to which it was relevant. No prejudice to the Respondent was occasioned by the admission of the affidavit by the Registrar.

Whether the Applicant was served with the claim form and its supporting documents and whether the default judgment ought to be set aside pursuant to rule 13.2.

[28] Rule 13.2 of the CPR states that:

> *"(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;*
>
> *(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." (Emphasis added)*

[29] It is the Applicant's claim that he had not filed an acknowledgment of service because he had not been served with the claim form and its supporting documents. The Applicant challenged the evidence of Mr. Jones, and asked the court to find that he was not a witness of truth. Counsel, Mr Campbell, posited that he found lapses in Mr Jones' memory to be too convenient, as he (Mr. Jones) was able to recall everything in relation to the service of the claim form on the Applicant, but not much in relation to his assertions that he visited the two locations on several other dates but was unable to locate the Applicant.

[30] Counsel for the Respondent, Miss Tiffany Barrett, argued that Mr Jones' evidence should be accepted as he was not shaken in cross-examination, and maintained that he had served the Applicant at his business place with the documents. She pointed out that the Applicant had contradicted himself on critical pieces of evidence, and so ought not to be believed. Relying on **Sasha-Gaye Saunders v Michael Green and others** (unreported), Supreme Court, Jamaica, Claim No 2005 HCV 2868, judgment delivered February 27, 2007, Miss Barrett emphasised that it was the knowledge that judgment had been entered against the Applicant that brought him to court.

[31] This Court, having heard Mr. Jones and having the opportunity to assess his demeanour, found him to be a witness of truth. The court found it remarkable that the Applicant insisted that the first time he was seeing Mr. Jones was when he served him with the order for seizure and sale, and yet, Mr. Jones addressed him as being the person against whom the judgment had been granted. Significantly too, the Applicant contradicted himself when he said that it was after he was served with the order for seizure and sale that he first contacted his lawyer. The evidence revealed that his application was filed on October 3, 2017, while the order for the seizure and sale was filed on November 10, 2017.

[32] The Applicant laboured very hard in trying to convince the court that Mr. Jones could not have served him with the claim form because he would collect his wife from her workplace at 5:00 p.m. on Wednesdays (paragraph 6 of his affidavit). (November 2, 2016 was a Wednesday). However, under cross-examination, he reluctantly admitted that he would sometimes close the shop after 5:00 p.m. Assessing the evidence as a whole, the court is convinced that the Applicant was the person who was served with the claim form. I would agree with counsel for the Respondent that it is his knowledge of the requirement of the payment of the judgment that has brought him to the court.

[33] I find that the default judgment was properly entered, and thus, the setting aside of that judgment as of right (pursuant to rule 13.2), does not arise in this situation. I will nonetheless go further to determine whether there are circumstances which may cause the Court to exercise its discretion to set aside the judgment.

Whether the default judgment should be set aside pursuant to rule 13.3 of the CPR

[34] The Court has a discretion to set aside or vary the default judgment in certain circumstances. Rule 13.3 provides:

> *"(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.*
>
> *(Rule 26.1(3) enables the court to attach conditions to any order.)"*

[35] The primary consideration is: does the Applicant have a real prospect of successfully defending the claim? The test for "reasonable prospect of success" was addressed in the case of **Swain v Hillman**, where Lord Woolf M.R. opined that the word "real" directed the court to the need to see whether there was a "realistic", as opposed to a "fanciful" prospect of success. The court should therefore consider the merits or demerits of the Defendant's case.

[36] The Applicant has filed an affidavit in which he asserts that he had an agreement with the Respondent whereby he would and did interview her artists, record, edit and then market their records. She offered him 5% of her company, Cabin Fever Studio, as part of his remuneration for the work that he would do, and also a seat on the board of her company. He has exhibited emails, dated March 11, 2013 and April 6, 2013, from the Respondent in which she admitted that she owed him fees for work done. The Respondent complained in the email of April 6, 2013 that the amount that the Applicant had been charging, which equates to over 3000GBP, for his fee was too exorbitant. Likewise, some of the loans and the amounts being challenged by the Applicant were confirmed by the email of March 11, 2013, on which he is relying to prove that the Respondent owes him monies for work which she contracted him to do.

[37] There is also a further email dated April 6, 2013 which is exhibited to the respondent's affidavit in response to the Applicant's affidavits where the Applicant admitted that he owed the Respondent $437,809.50. The sum of $437,809.50 is the equivalent to US$4,200.00 as was indicated by the calculations of the Applicant in that said email. I note that this same email spoke to estimated consultation fees owed by the Respondent and the sum total of those fees was US$4,200 and not US$14,000. This is in line with the Respondent's affidavit evidence.

[38] Without embarking on a mini-trial, I must do some evaluation of the evidence presented by the parties to assist me to in determining whether there is merit in the Applicant's case and ultimately, whether it has a real prospect of success. As

indicated, the Applicant has challenged the amount owed to the Respondent and the Respondent has agreed that she owes him monies.

[39] The Respondent has provided documentary proof of all the transactions between herself and the Applicant. The applicant on the other hand has not provided any documentary proof apart from his invoice, to substantiate his claim. The Respondent has even provided proof of payments that the Applicant made to her and has credited him with these payments. The Applicant on the other hand has stated that some of the sums sent to him were not necessarily loans and that the breakdown presented by her of some of the loan amounts seemed accurate. The Applicant's evidence concerning the loan amount owed by him does not seriously challenge the Respondent's claim.

[40] Miss Barrett argued that the Applicant had no real prospect of successfully defending the claim. She relied on several cases to include **Swain v Hillman** [2001] 1 All E.R. 91; and **Nadine Billone v Experts 2010 Company Ltd** [2013] JMSC Civ 150, in her discussion as to the meaning of "real prospect of success" as against what is meant as "fanciful". She argued that the Applicant had to show not just a mere arguable defence but rather a strong probable chance of succeeding in the claim. She stated that the Applicant's case is fanciful, without substance, and is contradicted by the documentary evidence filed in support of the Respondent's claim. She argued that the court should not grant the application, as it had not satisfied all the requirements stated in rules 13.2 and 13.3 of the CPR. The Applicant, she said, was served; did not apply to have the judgment entered against him set aside as soon as he found out that judgment had been entered; and he has no good explanation for his failure to file an acknowledgment of service or defence.

[41] I do not believe that there is a real prospect of the Applicant successfully defending the claim. Accordingly, having examined the Applicant's defence, I do not find that there are serious issues to be tried in the claim. This would determine the most important issue of whether to set aside the default judgment. However, I would

venture to consider the other points raised by Counsel for the Applicant to effectively dispose of the matter.

[42] Mr Campbell argued that the court ought to exercise its discretion in allowing the application, as there had not been an unreasonable delay in making the application to set aside the default judgment. Counsel asserted that the Applicant has a good explanation for not filing the acknowledgment of service; which was that he was never served with the claim form and its supporting documents. Counsel posited that the Applicant has a real prospect of successfully defending the claim against him, and had filed a defence and counterclaim in which he challenges the Respondent in respect of certain aspects of the claim. While the Applicant admits to owing the Respondent monies, counsel stated that the Respondent also owes the Applicant, and so the amount owed should be set off. The Applicant also pointed out that some of the monies being claimed by the Respondent were not loans, while some of the others had been written off by the Respondent.

[43] From the evidence, it can be gleaned that the Applicant would have been informed of the judgment as early as August 29, 2017 and yet, he only filed his application to set aside the judgment on October 3, 2017. It took him over one month to make his application. He has not given any explanation for this period of delay. He said he immediately took the “Interlocutory Judgment in Default of Acknowledgment of Service” to his lawyer and yet it took him a further five weeks to apply to the courts for relief. The period of delay, I find, was not “inordinately long” although one could not say that it was prompt. The fact that there was this delay, however, does not preclude the court from setting aside the judgment.

[44] The Applicant has said that he was not served and as a result could not have filed an acknowledgment of service or a defence. I have found that he was served, and in my view, there was no good reason for failing to file an acknowledgment of service or a defence. Failure to provide a good explanation for this non-compliance is a factor to be taken into account.

Should execution of the default judgment be stayed pending the trial of the Applicant's claim?

[45] The Applicant has also sought a stay of execution of the default judgment pending the trial of his counterclaim. In light of my findings that the Applicant does not have a real prospect of successfully defending the claim, I will just say that there is no good reason for the execution of a judgment rightly obtained by the Respondent to be stayed.

[46] The Applicant has argued strenuously that he has a claim against the Respondent and has asked the court to allow him to deal with it as a counterclaim. I bear in mind that a counter claim is a separate case from a claim and can be tried separately. A party can succeed on a claim and be unsuccessful on the counterclaim as such the Applicant is at liberty to pursue his claim against the Respondent if he so desires. This Court will not be preventing the Respondent from enjoying the benefits of her judgment properly obtained against the Applicant at this time.

CONCLUSION

[47] I therefore make the following orders:

1. The Notice of Application for Court Orders filed on October 3, 2017 is refused.

2. Costs of the application to the Respondent to be agreed or taxed.

3. The Applicant's Attorney-at-law to prepare, file and serve the orders herein.