[2015] JMSC Civ. 74

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013HCV04910

BETWEEN	**BLOSSOM EDWARDS**	**CLAIMANT**
AND	**RHONDA BEDWARD**	**DEFENDANT**

IN CHAMBERS

Ingrid Cole for the claimant

Carlton Williams for the defendant

April 14 and 21, 2015

CIVIL PROCEDURE – APPLICATION TO SET ASIDE PROPERLY OBTAINED DEFAULT JUDGMENT – WHETHER JUDGMENT SHOULD BE SET ASIDE – TEST TO BE APPLIED – APPLICATION OF RULE 13.3 OF THE CIVIL PROCEDURE RULES – COSTS

SYKES J

[1] Mrs Blossom Edwards is asking the court to reject the application by Miss Rhonda Bedward to set aside a judgment that was entered against Miss Bedward because she failed to file a defence. Miss Bedward makes the

surprising assertion in her affidavit that she did not know that the claim against her had reached court. She also claims that she was not served personally with claim form and particulars of claim. The application was granted with costs on an indemnity basis awarded against her. These are the reasons for the decision.

[2] Mrs Edwards is annoyed by the statements of Miss Bedward. Her ire is understandable in light of the following events which will now be told. On or about February 12, 2011, Mrs Edwards alleges that she was a customer in a store operated by Miss Bedward. It is said that while in the store, items fell on the head of Mrs Edwards and she suffered injuries.

[3] Mrs Edwards went to her attorney, Miss Ingrid Cole, who wrote directly to Miss Bedward in a letter dated January 28, 2013. In that letter, Miss Cole made the specific assertion that Miss Bedward was the owner of the store; Mrs Edwards was hit by boxes, lost consciousness and received injuries. The letter closed by inviting Miss Bedward to negotiate an amicable settlement. The point to notice here is that the letter went to Miss Bedward and not an attorney at law.

[4] By letter dated February 6, 2013, a letter came from an attorney law to Miss Cole. The letter began with these words, 'Yours of January 28, 2013 refers. We act on behalf of Ms Rhonda Bedward one of the proprietors of Fairlane Green Store and Grocery.' The letter was written without prejudice. The letter concluded by asking for more information about the claim. The significance of the letter is that Miss Bedward or someone on her behalf must have taken Miss Cole's letter to the attorney. The court is not privy to the communication between Miss Bedward and her attorney but, clearly, the arrangements must have been of such a nature that the attorney concluded that she was authorised to write to Miss Cole. Significantly, Miss Bedward has not asserted that the attorney acted without authority in writing the letter. Also, unless proven otherwise, the court must accept that the attorney was indeed retained to act for Miss Bedward. This conclusion is reinforced by this the affidavit of Miss Bedward where she specifically admitted that 'the claimant and my previous attorney at law were in

discussions in relation to allegations by the claimant that she was hit by carton box falling from a shelf' (para 3 of affidavit). Obviously, Miss Bedward knew of the dialogue between counsel and did not interrupt it.

[5] Miss Cole responded by letter of June 27, 2013 and gave full particulars of the injury (with medical report attached). The letter set out in careful detail the claim for general and special damages. There was no response in writing to this letter despite numerous telephone calls between counsel for the parties.

[6] By September 5, 2013, Miss Cole filed a claim on behalf of her client. The claim form and particulars of claim were served on Miss Bedward's attorney. Counsel for Miss Bedward filed an acknowledgement of service on September 20, 2013. The acknowledgement of service has within it a reminder to the defendant that she has fifty six days to file a defence. The time for filing a defence passed. The attorney for Miss Bedward did not return the claim form and particulars of claim. Miss Bedward has not asserted that her attorney was not authorised to receive service of documents.

[7] Her statement on this point is that she was never served with claim form and the particulars of claim. The court does not accept this position. The conduct of counsel for Miss Bedward and Miss Bedward's lack of denial leads to the conclusion that her lawyer was authorised to receive service. If, as the court has inferred that the attorney was authorised to accept service then there was no need for personal service on the claimant. The court therefore concludes that Miss Bedward was served because her attorney was authorised to accept service and cannot now complain on the basis that she was not served personally.

[8] Miss Cole, on behalf of her client, filed a request for judgment in default of defence in February 2014. A notice of assessment of damages dated May 26, 2014 was sent out to the defendant by the Registry. The date set for the assessment was October 29, 2014. As is common in these cases, it is this notice

that caught the attention of Miss Bedward. This notice led to the present application.

The law

[9] The rule relied on by Mr Williams is 13.3 of the Civil Procedure Rules ('CPR'). The current incarnation of the rule states:

> *(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 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.*

[10] Mr Carlton Williams has stated that Miss Bedward has a good defence and also that that consideration is now the main criterion as the law presently stands. Counsel also submitted that issues relating to how soon the application to set aside was made and whether the defendant provided a good reason are now reduced to mere factors to be considered when deciding whether a properly obtained default judgment should be set aside. Mr Williams' submissions are supported by authority from the Court of Appeal of Jamaica. In **Watson v Sewell** [2013] JMCA Civ 10 Phillips JA at **[44]**, **[45]** summarised the effect of the 2006

amendment to the CPR. Her Ladyship held that whereas, prior to that amendment, there were three conditions for setting aside judgments that had to be satisfied, the amendment has changed all that and has now proclaimed that primacy is given to whether the defendant has a real prospect of successfully defending the claim.

[11] In other words, the 2006 amendment put the law back to where it was prior to 2002. In fact the amendment has put the law back to where it was nearly one hundred years ago. In **Ken Sales & Marketing Ltd v James & Company (A Firm)** SCCA No 3/05 (unreported) (delivered December 20, 2005), Harrison P was contrasting the pre - CPR law with CPR as it stood between 2002 and 2006. His Lordship said at pages 5 – 6:

> *Under the old rules, the prime emphasis was placed on the defendant having a good defence. Even if the explanation for the failure to the acknowledgement was not prompt or the explanation was unsatisfactory, the good defence would predominate and influence the court greatly in setting aside a default judgment. The approach of the court was established in **Evans v Bartlam** [1937] A.C. 473 as to setting aside judgment by default, at common law is significant. Where was no determination of the case on its merits a court would always lean towards setting aside a judgment entered due to procedural breach. Note also **Vann v Awford** [1986] Times L.R. 23/4/86; (1980) 130 SJ, where even a lie told by the applicant did not deter the court from setting aside the judgment where a good defence existed. In the case of **Alpine Bulk Transport Co Inc. v Saudi Eagle Shipping Co. Inc.** [1986] 2 Lloyd's Rep 221 where the defendant deliberately allowed judgment to be entered by default, the Court of Appeal took that into account in assessing the justice of the case and because, in addition, no defence with any reasonable prospect of success was shown dismissed the appeal against a refusal to set aside the default judgment.*

[12] Harrison P's reference to **Evans v Bartlam** [1937] AC 473 was a reference to the law before the CPR. It appears that the analytical position adopted in the case has now been captured in rule 13.3. The next few paragraphs explain this conclusion. If it is the case that **Evans v Bartlam** is now the guiding light for the exercise of the discretion under rule 13.3 then an examination of that case would be in order. The defendant had judgment entered against him in the following circumstances. He was a gambler. His bets on horses at the race track went disastrously wrong and he was now indebted to the bookmaker to the tune of the princely sum of £1336. He paid some money on account which saw his indebtedness going down a bit. The bookmaker having not received any further payment on account passed on the debt collection to a third party. The ultimate claimant had dialogue with the applicant and the applicant was told that as long as the claimant was satisfied that the debt would be settled within a reasonable time no action would be taken. Predictably, the defendant made no further payment. A writ was issued and the defendant was personally served. He failed to enter an appearance and judgment was entered. The defendant wrote to the claimant to say that he still intended to pay and that was always his intention. The claimant wrote back to say that many promises had been made in the past and none was fulfilled and thus the only option left was to file a claim. Thereupon the defendant took out a summons to set aside the judgment. Eventually, the case arrived in the House of Lords. The House unanimously rejected the proposition that the defendant had, by his conduct, precluded himself from asking that the judgment be set aside.

[13] Before the House two submissions were advanced. The first was that there was a rule which stated that before a judgment could be set aside the defendant must show by an affidavit of merits that he has a prima facie defence. The second submission was that there was a second rule which was that the applicant to set aside judgment must fail unless he produced a reasonable explanation explaining why judgment was permitted to go by default. Lord Atkin robustly rejected the existence of any such rules. His Lordship went on to say that the real

principle is that unless and until a court has pronounced a judgment on the merits or by consent then it must 'have the power to revoke the expression of its coercive power where that has only been obtained by failure to follow any of the rules of procedure' (page 480).

[14] Lord Russell of Killowen, in respect of the existence of the two rules, held that no such rules existed either in terms of the applicable procedural rule or at common law. However, his Lordship did take the point that the submission contained an element of truth but this truth was limited to this: a judge exercising the setting aside discretion must necessarily (page 482):

> *consider both (a) whether any useful purpose could be served by setting aside the judgment, and obviously no useful purpose would be served if there were no possible defence to the action, and (b) how it came about that the applicant found himself bound by a judgment regularly obtained, to which he could have set up some serious defence. But to say that these two matters must necessarily enter into the judge's consideration is quite a different thing from asserting that their proof is a condition precedent to the existence or exercise of the discretionary power to set aside a judgment signed in default of appearance.*

[15] For the Law Lord, to say that some factor must be considered is not the same thing as saying that those factors must be satisfied before the discretion can be exercised in favour of the applicant.

[16] So what does all this pre-CPR reference have to do with the present rule? It is this: the current CPR, in rule 13.3 (2), states two factors that are considered. In keeping with the reasoning of Lord Russell, to consider factors does not mean that proof of the existence of those factors is a necessary condition for the

existence of or exercise of the discretion. The language of the rule makes it plain that the existence of a real prospect of successfully defending the claim is the main test. What is stated in the present rule 13.3 (2) are, as was the case in **Evans**, matters to consider but that does not amount a rigid inflexible test that must be met before the discretion can be exercised in favour of setting aside the judgment. Thus while the words of the rules that were extant in **Evans** are different from the words in rule 13.3, they yield the same conceptual approach, that is to say, the decision to whether to set aside a properly obtained judgment is guided by the circumstances of the case. This statement is subject only to the fact that in the present rules, the defendant only needs to establish a defence with a reasonable prospect of success. In **Evans**, the language was 'prima facie' defence (per Lord Atkin page 480), a 'serious; defence (per Lord Russell of Killowen at page 482) or has merits to which 'the Court should pay heed' (per Lord Wright at page 489). In practical terms there is not much difference between these expressions and 'real prospect of successfully defending the claim.' For these reasons this court concludes that rule 13.3 is a codification of **Evans**.

[17] Even if rule 13.3 had only the first paragraph, the conceptual approach would be identical to that taken by the House in **Evans**. All that the second paragraph has done is to state explicitly, two guidelines that the courts had developed on their own. The fact that these considerations are now written down has not elevated them to inflexible and rigid rules which must be satisfied.

[18] Lord Atkin was even prepared to contemplate that '[e]ven the first rule as to affidavit of merits could, in no doubt rare but appropriate cases, be departed from' (page 480). The reason for this was that 'the Court does not, and I doubt whether it can, lay down rigid rules which deprive it of jurisdiction' (page 480). In other words, the court must exercise care in how it develops even rules of practice if the effect of the rules of practice would deprive the court of a power it was explicitly given. Far reaching indeed.

[19] In light of the rule as it now stands and in light of the fact that rule 13.3 is not exhaustive, the search must now be for considerations that ought to be taken into account when exercising the discretion given by the rule. We now know that, based the cited passage from Harrison P, a defendant who lies is not barred from having the judgment set aside once a good defence exists. We also know from Brooks JA's judgment in **Jamaica Beverages Limited v Janet Edwards** [2010] JMCA App 11, that bare denials without fully meeting the Part 10 standard for defences in the CPR, in the face of a detailed and clear pleaded claim will not even get to the stage of considering the exercise of the discretion to set aside because all applications calling for the exercise of a discretion must provide the evidential material for the exercise of the discretion.

[20] The judge cannot make a moral judgment about the conduct of the defendant and use that as a basis for refusing to set aside the judgment. The comes out of the case of **Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc** [1986] 2 Lloyd's Rep 221, a case decided before the CPR, where the trial judge dismissed the application to set aside on two grounds. The more relevant one was that the 'the defendants had deliberately allowed the plaintiffs' claim to go by default, believing that all they could get would be a barren judgment until they remembered about the security. This the Judge described as "insouciance" and said that the defendants had treated the Court-- . . . with contempt and therefore, the defendants are not deserving of the court's exercise of its discretion in their favour.'

[21] The Court of Appeal held that was not a valid consideration because the judge had made a moral judgment of the defendants' behaviour rather than 'an assessment of the justice of the case as between the parties.' The Court went on to exercise its own discretion and upheld the judge.

[22] The considerations are not exhaustive and in an appropriate case would include whether the conduct of the defendant has deprived the claimant of vital evidence or witnesses which would no longer be available at the trial.

[23] The point being made is that the court cannot take into account how difficult Miss Bedward's conduct has been in order to decide whether the judgment should be set aside. It is a purely objective view.

[24] It is fair to say that if the defendant has made an assertion that cannot be defeated at the setting aside stage, then it is very difficult to see how it can be said that the defence has no real prospect of success. If this is now the primary criterion and even a lying defendant can still have the judgment set aside then it is not easy to see how the factors listed at rule 13.3 (2) even if decided against the defendant can deny the application except on grounds such as loss of evidence or witnesses, that is to say, matters that affect the ability of the claimant to prosecute his claim effectively.

Application to facts

[25] In this case what we have is a claimant who sought legal advice. She acted correctly throughout. She sent a pre-action letter to the defendant. The defendant was aware enough to engage the services of counsel very early in the day. The defendant's counsel invited the claimant's attorney to detail the claim. This was done. No written response came from the defendant. No counter proposal was put forward. The claimant waited and waited and waited. Despite telephone conversations between counsel nothing came from the defendant. A claim and particulars of claim were served. The defendant, through her attorney, filed an acknowledgement of service and for nearly six months did absolutely nothing else. The defendant must have known, since she had counsel, that failure to respond by filing a defence would, quite likely, lead to an application for judgment in default of defence. The claimant sought judgment in default of defence. The defendant did nothing until notice of the assessment was received. The defendant had made an assertion which cannot, at this stage, be shown to be either untrue or unreliable. The rule how permits this defendant to get back in the ring have taken a decision not to enter until the last possible moment.

[26] Miss Bedward has said in her defence that the box which fell did not strike Miss Edwards. As the material before the court presently stands, it is impossible to say that this defence has no real prospect of success. It is more than a denial; it is a positive assertion that the box which fell did not hit Miss Edwards at all. On the face of it the defence has merit. The judgment is therefore set aside.

Costs

[27] The leads to the next question of costs. The normal rule is that the successful party pays the costs of the unsuccessful party. Rule 64.6 (2) makes provision for the successful party to pay all or part of the costs of an unsuccessful party. Rule 64.6 (3) states that when deciding who should pay the costs the court must have regard to all the circumstances and rule 64.6 (4) indicates a number of factors the court must have regard to. Not all the factors listed apply here. The relevant ones are:

(1) the conduct of the parties both before and during the proceedings;

(2) whether a party succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;

(3) whether the claimant gave reasonable notice of intention to issue a claim.

[28] Mrs Edwards' conduct before the filing of the claim was exemplary. Mrs Edward did not succeed on the ultimate issue. Mrs Edwards gave more than reasonable notice. In the letter of January 28, 2013, Miss Cole wrote that she had clear instructions to file a claim if there was no response within fourteen (14) days. She waited a further eight (8) months before filing the claim. Having regard to these factors there is no doubt that Miss Bedward should pay a very significant part of Mrs Edwards' costs.

[29] Rule 64.6 (5), (6), (7) need to set out:

(5) The orders which the court may make under this rule include orders that a party must pay –

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps take in the proceedings;

(f) costs relating only to a distinct part of the proceedings;

(g) costs limited to basic cost in accordance with rule 65.10; and

(h) interest on costs from or until a certain date, including a date before judgment.

(6) Where the court would otherwise consider making an order under paragraphs (5) (c) to (f), it must instead, if practicable, make an order under paragraph (5) (a) or (b).

(7) Where the court has ordered a party to pay costs, it may make an interim order requiring the paying party to pay a fixed sum on account by a date stated in the order before the costs are taxed.

[30] Rule 64.6 (6) states that the court should consider whether an order under rule 64.6 (5) (a) or (b) is more practicable if the court is considering an order under rule 64.6 (5) (c) to (f). Practicable in this context is referring to ease and

convenience of assessment of costs in a cost-effective manner. Generally, costs are payable either on an issue basis or a proportionate basis. Issue based costs orders are to be avoided unless it obviously will lead to proper assessment of costs. The reason is that the taxing officer is not usually the trial judge and that officer unless furnished with a full written judgment or a full note of the oral judgment along with the pleadings will have great difficulty in deciding the quantum of costs to be allocated to the issue. The taxing officer may have difficulty in deciding how significant the issue really was in the case; whether a disproportionate amount of time was spent on the issue; whether the losing party on the issue responded appropriately and how the issue was actually argued at trial. Also issue based orders have a tendency to prolong costs hearing thereby adding significant costs what may already be a hefty bill. As can be seen, issue based assessments can be complex and costly. The court will make a proportion order expressed as a percentage.

[31] It also seems to this court that costs should be assessed on an indemnity basis because it was not reasonable for the defendant to behave as she did in this case. It was not reasonable to engage the claimant in discussion and then take no definitive position one way or the other. It was not reasonable not respond to the claimant's detail of the claim. It was not reasonable to file an acknowledgement of service, then not file a defence, sit back and only act when the notice of assessment was received. The conduct of the defendant was unreasonable to a high degree. As noted earlier, the court does not accept that she did not know that a claim was filed. While the attorney has a duty to keep the client abreast of what is happening in the case, so too the client has a duty to make timely enquiries of the attorney about the progress of the case. There is no evidence that Miss Bedward did that. She now seeks to blame her attorney. This court, having not heard from the attorney is not prepared to accept Miss Bedward's word on this point. The written material is more consistent with Miss Bedward's attorney acting under proper instruction than the contrary.

Conclusion

[32] It is the view of this court that Miss Bedward should pay eighty (80%) percent of Mrs Edwards' costs. This reflects that fact that Miss Bedward succeeded on the application but because of her conduct of the matter should pay the lion's share of Mrs Edwards' costs. The court is also of the view that costs should be assessed on an indemnity basis because Miss Bedward did nothing concrete after receiving the detailed letter of Miss Edwards setting out the basis of the claim as well as the quantum of damages being sought. In addition, Miss Bedward should pay interest on the costs. The costs should run from eight (8) weeks from the date of the letter Miss Cole wrote detailing the claim to the date of judgment on this application. That time was sufficient for a response to the letter detailing the claim. The rate of interest should be three (3%) percent.

[33] Interest is awarded because Mrs Edwards has expended significant sums of money retaining legal counsel. She has acted within the law and done all that was required of her. Her recovery of damages has been set back and it is only fair that interest be awarded on these sums already spent as compensation for keeping her out of pocket for this period of time and by all appearances, a further significant time to come.

Order

[34] The order of the court is

(1) judgment in default of defence set aside;

(2) defendant to pay eighty (80%) percent of claimant's costs with interest at three (3%) percent for the period beginning eight (8) weeks after the letter dated June 27, 2013 to April 21, 2015;

(3) case Management to take place on May 13, 2015.