[2022] JMSC Civ 180

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016HCV01851

BETWEEN	**TIMEKAY EDWARDS (A minor who sues by her mother and next-friend, Sovia Dickson-Edwards)**	**CLAIMANT/RESPONDENT**
AND	**MARLON HALL**	**DEFENDANT/APPLICANT**

IN CHAMBERS

Miss Houston Thompson instructed by Dunbar & Co. for the Defendant/Applicant

Mr. Dimitri Mitchell instructed by Kinghorn & Kinghorn for the Claimant/Respondent

Heard: June 16, July 6, September 27 & October 7, 2022.

Civil Procedure – Rule 13.3 of the CPR as amended [2006] – Application to set aside default judgment – Failure to file defence in time – Realistic prospect of success – Delay in making the application.

JACKSON, J (AG)

THE APPLICATION

[1] By this application, Mr Marlon Hall ("the Defendant") seeks an order of this court to set aside a default judgment regularly entered against him on July 30, 2018, and to have his acknowledgement of service and defence filed in June 2021, permitted to stand as if filed within time.

[2] In support of the Application, the Defendant relied on ten grounds. These, for ease of convenience, have been summarised and condensed as follows:

I. Advantage General Insurance Company, his insurer, was served with the Claim Form and Particulars of Claim by way of substituted service.

II. The insurer was unable to locate him to bring the contents of the claim to his attention.

III. After being located, he asked the insurer for time to locate and obtain information from one Barry, whom he believed was driving his motorcar at the time of the accident and could be useful in advancing his defence.

IV. Sometime in June 2021, he was informed by his insurer that the matter was listed for assessment of damages, and he became aware that a default judgment was entered against him.

V. He filed an acknowledgement of service and a defence on June 21, 2021.

VI. He believes he has a good defence to the claim and a real prospect of success.

VII. If the default judgment were not aside, it would prejudice him as he would not be given an opportunity to defend the claim.

VIII. His vehicle was never involved in any collision with the Claimant, so there was no negligence on his part.

IX. The application to set aside the judgment was made as soon as practicable after finding out that the default judgment was entered against him.

X. It is necessary that both parties be given an opportunity to be heard in keeping with the overriding objective of the Supreme Court of Jamaica Civil Procedure Rules, 2002 ('CPR').

[3] Unsurprisingly, the Claimant stood in strong opposition to the application.

[4] Before embarking on a detailed examination of the substantive application, it is necessary to outline a summary of the facts and the chronology of events that gave rise to the application.

FACTUAL BACKGROUND

[5] The Claimant contended that on or about February 18, 2011, she was on her way home from school, and while crossing the roadway along Main Street, Christiana, in the parish of Manchester, the Defendant negligently drove his vehicle in a manner which caused it to lose control and collided with her.

[6] The Claimant further averred that as a result of the incident, she sustained injuries to her right leg which resulted in her experiencing pain, swelling and a decreased range of movement in the injured leg. She received treatment at the Mandeville Regional Hospital.

[7] From the pleadings, the following are gleaned from the unchallenged procedural history:

(a) On May 6, 2016, the Claimant filed the Claim and Particulars of Claim.

(b) On June 28, 2017, Advantage General Insurance Company was served by way of substituted service with all related documents.

(c) The Defendant was located, and he was notified of the proceedings (there was no averment as to when the insurer notified the Defendant).

(d) On July 24, 2018, the Claimant successfully applied for and was granted a default judgment against the Defendant.

(e) In June 2021, Advantage General Insurance Company became aware of the default judgment when the matter was listed for assessment of damages.

(f) On June 21, 2021, the Defendant filed an acknowledgement of service and defence.

(g) On July 6, 2021, the Claimant was served with the acknowledgement of service and the defence.

(h) On July 14, 2021, the Defendant filed a Notice of Application for Court Orders with the affidavit in support to set aside the default judgment entered against him. A draft of his proposed defence was also attached to the affidavit in support of his application.

THE LAW

[8] The right of a defendant to access the court to set aside a default judgment is fully established and provided for in Part 13 of the CPR. The relevant provisions are rules, 13.3(1), 13.3(2) and 13.3 (4).

[9] Rule 13.3(1), as amended in 2006, provides that:

> *"13.3 (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."*

[10] Rule 13.3(2) provides two additional factors that the court must take into account. It reads:

> *"13.3 (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 defence, as the case may be."*

[11] Rule 13.4 sets out the procedure as follows:

> *"13.4 (1) An application may be made by any person who is directly affected by the entry of judgment.*
>
> ***(2) The application must be supported by evidence in the affidavit.***
>
> ***(3) The affidavit must exhibit a draft of the proposed defence."*** *(My emphasis)*

[12] For a defendant to set aside a default judgment regularly entered against him, the primary consideration is whether he has a real prospect of successfully defending the claim. Writing in 2010, Phillips JA in **Merlene Murray-Brown v Dunstan Harper and Winsome Harper** [2010] JMCA App 1, opined:

> *"[23] Rule 13.3 of the CPR governs cases, as its sub-title suggests, where the court may set aside or vary default judgments. In September 2006, the rule was amended, and there are no longer cumulative provisions which would permit 'a knockout blow' if one of the criteria is not met.* ***The focus of the court now in the exercise of its discretion is to assess whether the applicant has a real prospect of successfully defending the claim, but the court must also consider the matters set out in 13.3 [2] [a] & [b] of the rules."*** (My emphasis)

THE AFFIDAVIT OF MERIT

[13] In the well-known and oft-cited case of **Evans v Bartlam** [1937] AC 473, at page 480, Lord Atkin noted that one of the rules laid down to guide the courts in exercising its discretion to set aside a regularly obtained default judgment is that:

> *"…where the judgment was obtained regularly, there* ***must be an affidavit of merits,*** *meaning that the applicant must produce to the Court evidence that he has a prima facie defence." (My emphasis).*

[14] Accordingly, there is an almost inflexible rule that the application to set aside a default judgment must be supported by affidavit evidence stating the facts which show that the defendant has a defence of merit.

[15] Consequently, in order for the Defendant to succeed with his application, his supporting affidavit must disclose evidence that reveals he has a *prima facie*

defence. More specifically, the defence relied on must be more than merely arguable: it must carry some degree of conviction.

[16] This position has been well accepted and stated on innumerable occasions within this jurisdiction (see, for example, **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ. 2), and **Marcia Jarrett v South East Regional Health Authority and others** (unreported), Supreme Court, Jamaica, Claim No. 2006 HCV 00816, judgment delivered November 3, 2006).

[17] These cases have all made it clear that the evidence relied on for the defence to be used at trial must be clearly set out in the affidavit. Accordingly, it stands to reason that the mere serving or exhibiting of a draft defence without details of the defence being placed in the affidavit would be insufficient. The averments set out in a draft defence, from an obvious point of view, are not evidence. The affidavit, which is sworn testimony, is what the court has to and must rely on.

[18] In **Marcia Jarrett v South East Regional Health Authority and others** McDonald–Bishop J (Ag), as she then was, helpfully outlined the considerations for the court before setting aside a judgment regularly obtained. At paragraph 12, she opined as follows:

> *"12. From the provision of the CPR and the relevant case law, I think it would be safe to argue that the considerations for the court, before setting aside a judgment regularly obtained, should involve an assessment of the nature and quality of the defence; the period of delay between judgment and the application made to set it aside; the reasons for the defendant's failure to comply with the provisions of the rules as to the filing of a defence and the overriding objective which would necessitate a consideration as to any prejudice the claimant is likely to suffer if the default judgment is set aside."*

[19] The learned author, Stuart Sime, in his book, **A Practical Approach to Civil Procedure**, also noted that the evidence in support of an application to set aside a default judgment would have to address the defence on the merit, the reason for

not responding to the claim, and the explanation for the delay in making the application to set aside the default judgment.

[20] Lord Atkin, in **Evans v Bartlam**, at page 489, explained that:

> *"The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication… The Court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms as to costs or otherwise which the Court in its discretion is empowered by the rule to impose."*

[21] Having regard to the clear exposition of the law, I deem it necessary at this juncture to set out portions of the Defendant's affidavit.

[22] The relevant potions, in part, are as follows:

> *"I, Marlon Hall, being duly sworn, make oath and say as follows;*
>
> *….*
>
> *[5] That a representative from the firm of Dunbar & Co, Attorneys-at-law, contacted me and she advised me, and I do so verily believe that court documents were served on my insurance company, Advantage General Insurance Company Limited, for me pursuant to a court order for substituted service, but I cannot recall when.*
>
> *[6] That I was further advised by the representative that Dunbar & Co Attorneys-at-law was retained by my insurer, Advantage General Insurance Company Limited, to represent me in this matter as my insurance company is responsible for providing me with legal representation in such matters.*
>
> *[7] That I advised the said representative that I am not aware of my vehicle being involved in any accident and further that I sold my vehicle and the insurance policy was cancelled.*
>
> *[8] That I was further advised by the representative of Dunbar & Co. and she explained that I needed to respond to the suit by filing my Defence.*
>
> *[9] That I advised her that this was the first time I knew that a court matter had been started against me, and I needed time to clarify details concerning the alleged accident. Further, that I would need to get said information in order to proceed to which they advised me, and I do so verily believe that time is of the essence.*

[10] That I did not immediately give the Attorney's instructions as I did not fully understand the implications of the claim and could not have any accident with [the Claimant].

[11] That between February 2011 and June 2012, Barry drove my vehicle, so I needed to find out about the alleged incident.

[12] That in or about the month of June 2021, the matter herein was seen on the Assessment of Damage List by my Attorneys-at-Law, Dunbar & Co.

[13] That in or about the month of June 2021, a representative from the firm of Dunbar & Co, Attorneys-at-Law, again contacted me, and she advised that I do so verily believe that a Default Judgment was entered against me because my Defence was not filed.

[14] That as it was possible, I gave instructions to the firm to represent me and file an acknowledgement of service and Defence on my behalf.

…..

[17] That I have a good defence on the merits with a real prospect of success in that there was no negligence on my part of my vehicle was never involved in any collision with the Claimant. Further, I deny owing the Claimant any duty of care as I never had any collision with her. I exhibit a copy of my Defence marked MH1 for identification and adopt the contents of same.

[18] That the delay in filing my defence to the Claim was because I needed to clarify details concerning the alleged accident, as I did not forcefully understand the importance of the matter at hand.

[19] That it would be prejudicial to me if I am not given an opportunity of being able to defend the Claimant's Claim, especially since I never knew about it and have never had any collision or accident with the Claimant, nor do I owe her any duty of care…"

Does the Defendant have a real prospect of successfully defending the claim?

[23] Miss Thompson submitted that the Defendant's application met the requirements of the law in relation to setting aside a default judgment. She further argued that evidence advanced by him has demonstrated that there are factual issues which are necessary to be resolved at the trial on the question of liability. She emphasised that the application is supported by an affidavit of merit as well as a draft defence.

[24] Counsel further contended that given the circumstances of the case, it could not be said that the Defendant does not have a real prospect of success. Accordingly, she strongly urged the court to be wary of trying issues of fact solely on affidavit evidence, especially where there is an arguable defence. Accordingly, she contends that the exercise of the court's discretion should be swayed in the balance in favour of the Defendant.

[25] Miss Thompson has also asked the court to pay due regard to the well-known principle enunciated in **Evans v Bartlam** by Lord Atkin at page 480:

> *"…. that unless and until the Court has pronounced judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow the rules of procedures."*

[26] In the round, counsel submitted that the prevention of injustice is the primary reason why the court is empowered with the discretion to set aside a default judgment and further added that in light of the overall circumstances of this case, if the default judgment is not set aside, it would bring forth injustice in the case.

[27] She reminded the court of the reasoning of Sir Roger Ormrod in **Alpine Bulk Transport Co. Inc v Saudi Eagle Shipping Co. Inc** [1986] 2 Lloyd's Rep 221 ("**The Saudi Eagle**") that:

> *"The purpose of this discretionary power is to avoid injustice which might be caused if judgment followed automatically on default. The primary consideration is whether the Defendant has merits to which the Court should pay heed."*

[28] Mr Mitchell fiercely disagreed with the arguments advanced by Miss Thompson. In advancing his position, he placed strong reliance on the cases of **Harley v Sampson** (1914) 30 TLR 450 and **Ameco Caribbean Inc v Seymour Ferguson** [2021] JMCA Civ. 53.

[29] In relying on these cases, Mr Mitchell conveyed to the court that a good defence does not guarantee the setting aside of a default judgment where there is clear evidence of dilatory conduct on the part of the Defendant. He went on to argue that

the delay on the part of the Defendant, in this case, is inordinate and has urged the court to give much weight to that fact as a decisive factor in deciding whether to grant the extension of time.

[30] Mr Mitchell further contended that the stage at which the proceedings currently exist, if an extension of time were granted, would significantly prejudice the Claimant, who already has a judgment in her hand. He further contended to have it set aside would not be in keeping with the overriding objective of the CPR as outlined in rule 1.1, especially where the Claimant has complied with all the rules of court and every court order,

[31] For a determination on this factor, it is necessary for this court to have an appreciation of the principles distilled and extracted from the cases as to what is a real as opposed to a fanciful prospect of successfully defending the claim.

[32] Lord Woolf, in **Swain v Hillman and another** [2001] 1 All ER 91, provided the much oft-cited guidance. At page 92, he opined:

> *"The words, 'no real prospect of succeeding' do not need any amplification; they speak for themselves. The word 'real' distinguishes fanciful prospects of success or...they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."*

[33] In **Sasha-Gaye Saunders v Michael Green and others** (unreported), Supreme Court, Jamaica, Claim No. 2005 HCV 2868, a judgment delivered February 27, 2007), Sykes J, as he then was, reiterates this definition and gives the court practical insights on how the court can make this determination. He helpfully pointed out that:

> *"22. …This test of real prospect of successfully defending the claim is certainly higher than the test of an arguable defence (see **ED&F Man Liquid Products v Patel & ANR** [2003] C.P Rep 51). Real prospect does not mean some prospect. Real prospect is not blind or misguided exuberance. It is open to the court, where available, to look at contemporaneous documents and other materials to see if the prospect is real. The court pointed out that while a mini-trial was not to be conducted, that did not mean that a defendant was free to make any assertion, and the*

> *judge must accept it. This, in my view, is good sense and good logic. Lord Justice Potter said at paragraph 10:*
>
> > *However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost of delay of trying an issue the outcome which is inevitable…"*

[34] In **The Saudi Eagle**, Sir Roger Ormrod stated that for the court "to arrive at a reasoned assessment of the justice of the case, the court must form a provisional view of the likely outcome if the judgment were to be set aside and the defence developed".

[35] On a close examination of the Defendant's affidavit evidence, this court has found that the affidavit contained insufficient evidence to help the court to form a provisional view that the order for default judgment ought to be set aside as there are serious issues to be tried.

[36] The Court finds that there are a series of inconsistencies, contradictions and bald assertions in the Defendant's affidavit. Firstly, he stated that there was no negligence on his part as his vehicle was never involved in any collision with the Claimant. However, in the same affidavit, he had also deponed that "between February 2011 and June 2012, Barry drove my vehicle, so I needed to find out about the alleged accident".

[37] In the face of those assertions, the Defendant did not provide any evidence to suggest that Barry was located, what steps he had taken to locate Barry if any, and whether Barry was his servant or agent or was acting without his permission. The court finds that without an account from "Barry", the Defendant faces an uphill, if not an impossible, task to establish that he has an arguable defence with a realistic prospect of success.

[38] Secondly, the Defendant also declared that he had sold his vehicle, and the insurance policy was cancelled. Again, he provided no evidence of this. This court notes, however, that the accident is alleged to have occurred on February 18, 2011, and that the Defendant's affidavit evidence is that "between February 2011 and June 2012, Barry drove my vehicle". It appears, therefore, based on the Defendant's own affidavit evidence, that he was the owner of the motor vehicle up to at least June 2012.

[39] The law is quite clear that the court must have evidence of merit to determine whether the default judgment should be set aside. The court finds that the Defendant's proposed defence is fraught with a series of assertions heavily bound in contradictions and inconsistencies.

[40] Consequently, I do not agree with the submission of Miss Thompson that the Defendant has provided enough evidence to show that he has a real prospect of successfully defending the claim. Merely denying the incident is not enough to set aside the judgment.

[41] For this, I rely on the sage words of the Learned author Craig Osborne, in his work **Civil Litigation, Legal Practice Course Guides 2005 – 2006,** where at page 364, he offers the guidance that:

> *"…a defendant who seeks to set aside a judgment which was properly obtained will himself have to file evidence to persuade the court that there are serious issues which provide a real prospect of him successfully defending the claim by putting forward arguments based on law or facts. The evidence filed must be verified by a statement of truth explaining the background (for example, why the time passed without him responding properly to the claim form) and setting out his defence in sufficient details to satisfy the test. On receipt of that evidence it will be open to the claimant to amplify his own statement of case by further written evidence (for example to demonstrate that the defendant's evidence lacks any credibility or to produce material which undermines it, such as contemporary documents)."*

[42] Notwithstanding my finding on this primary factor, in keeping with the rules, I am obliged to go on to consider the other factors listed in rule 13.3(2).

Did the Defendant act promptly to set aside the default judgment?

[43] In addressing this factor, I do not consider it necessary to repeat the timelines. The parties are at *ad idem* that there was a delay in making the application. The claim was filed in May 2016; the default judgment was obtained in July 2018, and the application to set it aside was made in July 2021. This was some three (3) years later.

[44] I find as a fact that the application to set aside the judgment was not made with the degree of promptitude required by the rules.

Is there a good explanation for failing to file a Defence?

[45] Although Miss Thompson conceded that there was a delay in making the application, she submitted that the delay was not due to the Defendant's fault, nor was it wilful or inordinate. She said the delay was unavoidable in the circumstances. Counsel contended that the Defendant's insurers were served by way of substituted service, and they had difficulty locating the Defendant, and as such, the instructions were not received until sometime after service was effected on them.

[46] She relied on the case of **Blossom Edwards v Rhonda Bedward** [2015] JMSC Civ. 74, where Sykes J, as he then was, stated at paragraphs 25 and 26 that:

> *"[25] …The claimant sought judgment in default of defence. The defendant did nothing until notice of assessment was received… The rule now permits the defendant to get back in the ring have (sic) taken a decision not to enter until the last possible moment.*
>
> *[26] …As the material before the court now stands, it is impossible to say that this defence has no real prospect of success… On the face of it, the defence has merit."*

[47] Counsel went on to argue that rule 13.3 of the CPR places great focus on the merits of the defence. Counsel submitted that while the court should take note of the delay and the reasons proffered, the delay by itself is only one of the factors to be considered and is not the court's primary consideration. In this regard, she

relied on **Sasha-Gaye Saunders v Michael Green and others** where Sykes J, as he then was held that:

> *"20. This new rule no longer has strict gatekeeping provisions as the previous rule 13.3...*
>
> *21. …the new rule in Jamaica has only one ground, and that is whether there is a real prospect of successfully defending the claim."*

[48] Mr Mitchell strongly opposed counsel's submissions on this point. In advancing his arguments, he contended that regard must be had to the overriding objective as enunciated in rule 1.1 of the CPR. He argued that the Defendant laid dormant, and he did nothing to advance the matter until 2021. Counsel submitted that in a case where the delay is measured in years, such as the instant case, such a delay is extraordinary and will prejudice the Claimant, who has received judgment. He contended that significant consideration must be given to the length of the delay and the attended prejudice to the Claimant. Mr Mitchell argued that the sole underlying principle of the overriding objective is to do justice and to do justice means to frown on inordinate and unjust delay.

[49] In considering the factor, this court is in agreement with the arguments posited by Mr Mitchell.

[50] In relation to this factor, a pertinent observation of this court is the absence of evidence coming from the Defendant setting out specific timelines. There is no evidence in the Defendant's affidavit, which would alert the court as to the date or period within which the proceedings came to his attention. This is extremely critical. Equally, there was no evidence of this from Advantage General, who effected service on him.

[51] These have to be critical components of the body of evidence the defendant or his insurer wishes the court to rely on. What is clear, however, is that the Defendant averred that he was advised by a representative from Dunbar & Co. that he needed to respond to the suit by filing a defence and that he verily believed that time was of the essence.

[52] Accordingly, from the Defendant's own admission, he was aware that time was of the essence, yet he did nothing was done to progress his defence until 2021. The court considers this to be deliberate. The Defendant is permitted to apply for an extension of time to file a defence through the courts or seek an extension by agreement. This was never done.

[53] When taken as a whole, I do not consider the explanation provided to be a good one. Again, the court reiterates that it was left with several gaps in relation to the Defendant's efforts to locate Barry; when did he commence searching for Barry, and what challenges he faced, if any, in finding Barry? Why did he fail to communicate with his attorneys-at-law or his insurance company about the progress of his search activities, being cognisant, on his own admission, that time was of the essence? I am in agreement with Mr Mitchell that the Defendant laid dormant.

Should the default judgment be set aside?

[54] Therefore, the penultimate question now remains for me: should the judgment be set aside in all the circumstances as considered and in light of the overriding objective of enabling the court to deal with cases justly?

[55] I accept that the discretionary power to be exercised by the court in an application of this nature is not to punish a party for incompetence or technical breach without having a hearing on the merits.

[56] Equally, I must also have due regard to the fact that the Claimant has a judgment in her hand. In **International Finance Corporation v. Utexafrica S.P.R.L**. [2001] EWHC 508 (Comm), Moore-Bick, J. underscored the importance that must be attached to all judgments. The learned Judge stated as follows: -

> *"8. …A person who holds a regular judgment, even a default judgment, has something of value, and in order to avoid injustice, he should not be deprived of it without good reason."*

[57] Upon a careful assessment of the state of the evidence before me, I find that the circumstances averred by the Defendant are devoid of good reasons. The delay is unquestionably inordinate. The defence of merit, in this court's view does not evince a reasonable prospect of success.

[58] In all the circumstances, I would refuse the Defendant's application to set aside the default judgment.

DISPOSAL

[59] The court, therefore, makes the following orders:

1. The Notice of Application to set aside the default judgment is refused.

2. Costs of the application to the Claimant, to be taxed, if not agreed.

3. The substantive matter is to be reverted to the Hearing of Assessment for Damages which is scheduled for October 11, 2022, at 11:00 am in accordance with the order of Hutchinson J, which was made on June 10, 2021.

4. The Applicant's application for leave to appeal is refused.

5. The Applicant's application for a stay or proceedings pending leave to appeal is refused.