[2016] JMSC Civ. 80

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2012HCV02469**

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| **BETWEEN** | **MICHAEL EUBANKS** | **CLAIMANT** |
| **AND** | **PAUL CHRISTIE** | **DEFENDANT** |

**IN CHAMBERS**

**Mr. Anwar Wright instructed by Taylor Wright and Co. Attorneys-at-Law for the Claimant**

**Dr. Delroy Beckford instructed by Samuel Beckford Attorneys-at-Law for the Defendant.**

**Heard: 19th February 2015, 3rd and 8th March 2016 and 18th May 2016**

**Civil Procedure - Application to set aside default judgment - Rules 13.2 - Rule 13.3 Civil Procedure Rules (CPR) 2002 as Amended 2006 - Test to be applied - Real prospect of success - Whether judgement should be set aside as of right - Overriding objective.**

**BERTRAM LINTON, J (AG.)**

**[1]** On the 17th July 2010 the claimant, while in the course of his employment fell asleep at the wheel while driving a vehicle owned by the defendant for whom he worked as a deliveryman. The vehicle collided into a wall and the claimant says it was the fault of the defendant that this happened. He was suffering from extreme exhaustion and fatigue and was sleep deprived as a result of the defendant's insistence that he drive well in excess of safe hours and for long distances.

**The Application**

**[2]** The defendant is subject to a default judgment which took effect on the 4th June, 2012. He contends that he only became aware of the court action when he received the Notice of assessment of damages which was eventually adjourned to November 13th 2013 at which time he sought legal advice and filed the following application and affidavit in support on 2nd December 2013. It is necessary that it be set out in detail. It recites;

"The Defendant seeks the following orders;

1. That the court set aside the Judgment in Default of Acknowledgment of Service and Defence entered on the 4th day of June 2012.

2. That the Defendant be granted leave to file an Acknowledgment of Service of Claim Form and Defence and Counterclaim herein within 14 days from the date of this Order.

3. That the Application for Assessment of Damages and all subsequent proceedings be stayed.

4. That the time required for filing this notice be waived.

5. That the Affiant of the Affidavit of Service in the subject proceedings be permitted or required to attend for cross examination pursuant to Rule 26.1(2)(1) of the Civil Procedure Rules, 2002.

6. Such further and other relief as may be just."

There after the defendant asserts as the first ground that he was not personally served with the originating documents in the claim as well as the default judgment which was issued. In addition and among other things the defendant says that he has a real prospect of successfully defending the claim and should be given a chance to do so.

**[3]** An Amended Notice of Application was filed on 4th March 2016 which extended paragraph 1 to say that the application was "pursuant to Rule 13.3(1) and/or 13.3(2) of the Civil Procedure Rules. Which was well into the hearing of the matter.

**[4]** A Further Amended Notice was filed **at the end of submissions** on the 8th March, 2016, which asks in paragraph 1, "That the court set aside the Judgment in Default of Acknowledgment of Service and Defence entered on the 4th day of June 2012 pursuant to Rule 13.2(1) and/or 13.3(2) of the Civil Procedure Rules.

**[5]** The affidavit in support is sworn to by the defendant, filed on the 2nd December, 2013, and speaks to the service of documents as outlined in the Affidavit of Service filed by Junior Wilson the process server, and the supplemental affidavit of service while highlighting that it was not true that he identified himself and accepted the documents as sworn to by the process server.

**[6]** He goes on to say that even though he is contesting the manner of service of the documents he also has a good defence to the case and a real prospect of successfully defending the claim. Thereafter is attached his proposed Defence and Counterclaim in which he denies responsibility for the claimant's physical or mental state when the accident took place and asserts that it is the defendant who must answer for the extensive damages to the vehicle which was in his care and which the defendant says the claimant did not take care of as was his responsibility, resulting in extensive damage and costly repairs.

**[7]** The documents to which the defendant refers and which he calls into question are the Affidavit of Service, sworn to by the process server Junior Wilson, and filed on the 14th May, 2012 and the Supplemental Affidavit of Service sworn to and filed on the 23rd November 2012.These laid the foundation for the application and entry of the default judgment. Mr. Wilson first says that the defendant acknowledged that he was the person in the documents and accepted service personally. When asked later about how he identified the defendant, a

supplemental affidavit was filed setting out for the first time that it was the claimant , who had accompanied him and pointed out the defendant.

**[8]** There is also the affidavit of Andrea Reid filed on 6th February 2014 in support of the defendant's application. She identifies herself as the store manager for that location of the business. She says that on the day in question she received what she thinks are the documents, (since she says she never opened the mail) and advised the individual leaving it that the defendant was not there. She put it with other documents and does not know if the defendant ever saw or opened it. The Applicant submits that the default judgment should be set aside as of right since it was never served personally in keeping with the rules.

**[9]** The applicant says that even if you find that the service was proper, there is ample reason to set aside the judgment on the basis that the defendant 'has a real prospect of successfully defending the claim'. Dr Beckford the attorney for the applicant points out, among other things that given the issues that have been raised in the defence and counterclaim as to the claimants expectation of work hours and the need to show that the claimant was indeed pressured or directed to work for the excessive hours, thereby laying the foundation for the claim in negligence which he says brought about the accident, there was every likelihood that the defendant would be successful as it was the claimant who was responsible for the decision to take advantage of the overtime payment which would be the result of the long hours worked.

**The Claimants Case**

**[10]** In opposition to the application the claimant says the issue of service was not stated to be a basis for the application from the start and the applicant should not be allowed to maintain this stance in light if the late amendment. He resisted stoutly the invoking of Rule 13.2 and says the court should hold the parties to the original application and examine the arguments strictly in relation to whether the applicant has a real prospect of success as required under CPR Rule 13.3 (1) and 13.3 (2)

**[11]** Mr. Wright contends that not having stated that the application invoked Rule 13.2 from the beginning, it is to be taken that the issue of service was waived by the applicant and the claimant would be prejudiced if the defendant was allowed to rely on this as a basis for setting aside the judgment, since the amendment came very late and after the claimant had already closed its arguments. In addition, it would be unjust to allow the defendant to come in and defend at this stage, even pursuant to Rule 13.3 because of the protracted delay and because there is no evidence before the court to support an assertion of the real prospect of success on the merits of the case.

**The Law**

**[12]** CPR Rule 13.2

"Cases where court must set aside default judgment

13.2 (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 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 the judgment was entered.

**(2) The court may set aside judgment under this rule on or without an application. (Emphasis mine)**

CPR Rule 13.3

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.

(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 was entered.

(b) given a good explanation for the failure to file an acknowledgment 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.

**Issues**

**[13]** 1. Has the criteria under CPR Rule 12 in relation to service been satisfied such that there can be a determination that the default judgment was properly entered.

2. If default judgment was properly entered, should it be set aside on the criteria and considerations in CPR Rule 13.3(1) and 13.3(2)

**Discussion and Findings**

**[14]** I have gone into some detail into the documents before the court in order to set out that even though the application did not say it was being made pursuant to CPR Rule 13.2, from the start, it was clear that this was the foremost line of argument that was being proffered as the reason for the application to set aside the default judgment. In any event it is my understanding that in relation to Rule 13.2 (2) that the court **has discretion to set aside a default judgment if the conditions are there, that is if there is a finding that one of the conditions under Part 12 has not been complied with. This may be done purely at the instance of the court and without either party making an application.**

Parts 12.4 (a) and 12. 5 (a) says clearly that the registry enters judgment against a defendant for failure to file an acknowledgment of service or a defence if the claimant proves service of the claim form and particulars of claim.

**[15]** In pursuance of the application, and the issues that were now joined between the parties, the court made orders on 19th February 2015 requiring the claimant, defendant and the process server to attend for cross examination. This was also prompted by the applicant's Notice of Application in the order #5 which was sought and which was assessed by the court to be pivotal in the determination of the issues. It therefore seems strange that the claimant's attorney who was present when the orders were made and who participated in the exercise of cross examination which had the sole intention of providing evidence for the court on the issue of service, should assert that the issue of service was never a live one until the amendment was served during the course of the hearing, or that service was waived in relation to the originating documents.

**[16]** I am not able to agree at all with or adopt the contention of Mr. Wright that:

"19. The application only speaks to there being no personal service, which in itself amounts to an admission, on the defendant's case, that there was service albeit not personal.

20. In fact, on cross examination, the defendant stated that it was his case that he was not served personally, but that his employee Andrea Reid that (sic) that was served with the claim documents on 4th March 2012.

21. I submit that this admission, along with the substance of the application for permission to defend, and the acknowledgment of service, all absent any challenge to the jurisdiction of this court, unequivocally amount to a waiver of service." [Extracted from the claimant's written closing submissions].

**[17]** This position is untenable for three reasons. Firstly the claimant seems to accept the evidence of the defendant and his witness Andrea Reid, that his employee was served and not him; secondly he is seeking to adopt, justify and take advantage of the incorrect procedure for service adopted by the process server; thirdly and most importantly, the position as outlined and accepted casts grave doubt on the evidence of the process server and the claimant himself who both

say in cross examination and in a sworn document that the originating documents were put into the hands of the defendant at the date and location specified in the Affidavit and the Supplemental document, which laid the foundation for the entry of the default judgment.

**[18]** On the occasion of the cross examination the court had an opportunity to observe the witnesses and to draw conclusions from the evidence given and their demeanor during the course of the exercise. In my judgment the process server was not a witness of truth. He was not able to add or clarify the physical circumstances under which the handing of the documents to the defendant took place. His demeanor was stilted and his answers terse. Mr. Eubank's evidence as well that he was present when the service took place was also not believable. In fact it further buttresses the position in keeping with Mr. Wright's submission that the documents were deemed to have been served on the defendant when they were left at his business place with his employee.

The process server at that time says he did not know the defendant but he was pointed out by the claimant. The claimant was not able to supply any information as to how he was able to locate the defendant that day at that outlet even though it is not the main office and he had left the employ of the defendant for some time.

**[19]** In the case of **Sasha Gaye Saunders v Michael Green et al [2005] HCV2868** a similar situation arose where the court was asked to examine the issue of service and it was argued that this assertion of non service was not in the original application but an afterthought in an attempt to thwart the judgment. Mr. Justice Sykes opined (at paragraph 9) that it is more in keeping with logic and common sense that the litigant who has a ground, (Rule 13.2) which if he were successful in arguing it, would secure the desired result of the application, would head straight to it rather than taking the harder more circuitous route (Rule13.3).

**[20]** In sharp contrast in the case at bar we have the issue, though not referred to by its stated rule number, we see the applicant from the outset, seeking to impugn the integrity of the "Affiant of the Affidavit of service" via cross examination and alleging at the outset in the first three grounds of the application that the issue of service of various documents were in question. This conduct is squarely in keeping with the view that proper service was never achieved.

**[21]** It is therefore my finding on a balance of probability with respect to the first Issue, that the requirement for personal service as prescribed under CPR Rules12.4 and 12.5 were not met and as such pursuant to CPR Rule 13.2(1) the judgment **MUST** be set aside as of right.

**[22]** This means that it is no longer necessary to go on to the next issue, but for completeness I will look briefly at the main issue attendant upon the question of whether there is a real prospect of successfully defending the claim by Mr. Christie if the matter were to go forward. This would of course presuppose that the finding had been that the judgment had been properly entered and the court's discretion has to be exercised in the setting aside of that properly obtained default judgment.

**[23]** The defence as put forward, denies any negligence in respect of the causation of the accident. The allegation is that there was no safe system of work since the claimant was required to work beyond the regular working hours in any one day, and this placed him in a position to become extremely exhausted and so create the conditions which brought about the collision.

In meeting this claim the defendant would have to join issue with the various facts as laid down by the claimant and the court make findings as to the work environment and the expectations that had been communicated.

**[24]** Several triable issues emerge, chief among which would be whether the mental and physical state of the claimant at the time of the collision was as a result of the work environment or some other factors that may have been idiosyncratic to the claimant. Another major factor raised in the defence is the question of

whether the claimant was directed to work long hours or if it was a decision made by him in order to reap the benefit of the overtime payment. The issues are indeed joined and it is in my judgment the raising of those issues that have brought the matter squarely within the criteria laid down in Rule 13.3 , that of a defence with a real prospect of success at trial.

**[25]** Based on the foregoing then, I find that the claimant has failed to satisfy the court that the requirements in Part 12 were adequately satisfied before the default judgment was entered.

1. The default judgment entered on the 4th June 2012 is set aside.

2. Costs for the application are awarded to the defendant to be agreed or taxed.

3. Formal order to be filed and served by the applicant

4. Leave to appeal is granted on the application of the claimant.