[2020] JMSC Civ 204

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018 HCV 01968

BETWEEN	**WENDEL GAYLE**	**CLAIMANT**
AND	**TOP BRANDS INTERNATIONAL CO LTD**	**1ST DEFENDANT**
AND	**DONOVAN BLAKE**	**2ND DEFENDANT**

IN CHAMBERS

Mr Lemar Neale instructed by NealLex Attorneys-at-law for the Claimant/Respondent

Mrs Claudeen Stewart-Linton instructed by Burton-Campbell & Associates Attorneys-at-law for the Defendant/Applicant

Heard: September 24, 2020 and October 15, 2020

Civil Procedure - Application to set aside default judgment and file defence out of time CPR 13.3 and CPR 10.3(9)

MOTT TULLOCH-REID, MASTER

BACKGROUND

[1] The First Defendant has applied to the Court for an order that the default judgment entered in favour of the Claimant be set aside and that it be allowed time to file its Defence. The application is supported by two affidavits, the affidavit of Yasmeen Traille who identifies herself as a director of the First Defendant and Mr Donovan

Blake who is named as the Second Defendant. Mr Blake was the driver of the motor vehicle which collided into the rear of the Claimant's motor vehicle. His undisputed evidence is that he was never served with the initiating documents. His affidavit therefore is being put forward as the person who was driving the vehicle on the day of the collision.

[2] The Default Judgment was entered on January 24, 2020 in Judgment Binder 774 Folio 375. The First Defendant is not denying that it was served with the initiating documents, it grounds its application instead on the basis that it has a real prospect of successfully defending the claim pursuant to CPR 13.3. CPR 13.3 also requires the application to be made as soon as reasonably practicable after finding out that the default judgment has been entered and also that the applicant sets out a good explanation for its failure to file an acknowledgment of service and defence within the time set out by the CPR.

Applied as soon as reasonably practicable.

[3] Ms Traille was obviously not on the scene of the accident. Her affidavit is to indicate the time when the application was made and provide an explanation for the delay in making the application. On July 5, 2018 Master Mason ordered that the initiating documents be served on the First Defendant's insurance company and that the First Defendant was to file and serve an Acknowledgment of Service and Defence within 14 days and 42 days respectively of the insurers being served with the documents. The Affidavit of Service filed on December 4, 2018 sets out the date the initiating documents were served on the Defendant's insurers, pursuant to Master Mason's order as being July 17, 2018. This means that the First Defendant should have acknowledged service on or before July 31, 2018 and filed and served a defence to the claim on or before August 28, 2018. The Acknowledgment of Service is out of time.

[4] Mr Neale submits that there was a 49-day delay from the entering of the default judgment to the date on which the First Defendant applied to set aside the default

judgment. I believe he is counting from the date the default judgment was requested, that being, December 4, 2018 to the date the application was made, that being February 14, 2019. That however is not the correct way to compute the time in this situation and in any event, I could not say that a delay of 49 days is significant when the Court of Appeal in the case of ***Philip Hamilton (Executor in the estate of Arthur Roy Hutchinson, deceased, testate) v Frederick Flemmings and Gertrude Flemmings [2010] JMCA Civ 19*** found that a delay of 4½ months was not excessive.

[5] In determining if there is a delay in the filing of the application to set aside a default judgment, CPR 13.3(2)(a) provides that the court must consider whether the defendant has:

> *"applied to the court as soon as is reasonably practicable after finding out that judgment has been entered".*

I am therefore required to count time, not from the date of service of the claim form or the date when the default judgment was requested, but from the date on which the defendant found out that the judgment had been entered. The defendant usually finds out that the default judgment has been entered when it is served on him. In this case the Default Judgment was entered on January 24, 2020. The application to set aside the judgment was filed on February 14, 2019, almost one year before the judgment was entered. I have not seen on the Court's file where the Claimant has as yet even served the Defendant with the attested default judgment and as such since the application to set aside was made prior to the default judgment even being entered, I must find that there was no delay in the making of the application.

Good explanation

[6] On July 5, 2018, Master Mason ordered that personal service of the claim form with the accompanying documents and the particulars of claim on the first defendant was dispensed with and the documents were to be served on Advantage General Insurance Company Ltd. The Claimant's attorneys-at-law

complied with the order on July 17, 2018 as evidenced in the Affidavit of Service sworn to by Shauna Gay Neale. Master Mason also ordered that the First Defendant was to file and serve its acknowledgment of service and defence to the claim within 14 and 42 days of service on Advantage General Insurance Company Ltd.

[7] I note that the First Defendant's acknowledgment of service indicated when the document was received by the First Defendant. That date is not important for the purpose of when the acknowledgment of service and defence should be filed and served in light of the order of the Court. Counsel for the First Defendant in drafting the acknowledgment of service should indicate when the document was served on the insurance company in circumstances when the Court has ordered that the acknowledgment of service and defence are to be filed and served within a period from the service of the claim form on the insurance company. That is the date from which time will run for requests to be made for default judgment and that is the date from which time will run at the trial when interest is to be determined on general damages.

[8] The affidavit of Yasmeen Traille filed in support of the application seeks to explain the reason for failing to file the acknowledgment of service and defence in time. Her evidence is that the initiating documents were only brought to the attention of the First Defendant by its insurers, Advantage General Insurance Company Limited on January 29, 2019. This would be approximately 6 months after the documents were served on the insurance company. Having received the documents on January 29, 2019, the First Defendant met with its attorneys-at-law on February 13, 2019, two weeks later, and the Acknowledgment of Service was filed on February 14, 2019.

[9] The explanation for failing to file documents in response to the claim is a good one. I cannot in circumstances, where it was the First Defendant's insurance company which delayed in bringing the documents to the First Defendant's attention, blame the First Defendant for its failure to respond in a timely manner, for how can

someone respond to something of which they have no knowledge? Having come to the knowledge of the claim, the First Defendant acted promptly in filing documents, including the application to set aside default judgment which was filed on the same day the acknowledgment of service was filed.

Application to strike out hearsay evidence

[10] Before I delve into the belly of this test, I must consider Mr Neale's application to strike out the last sentence in paragraph 5 of the Affidavit of Donovan Blake which reads

> *"She stated that he had no previous injury to his back".*

Mr Neale says that that statement amounts to hearsay and should be struck out. I agree with him. The sentence is struck out and the First Defendant cannot rely on that statement as a part of its evidence.

Real Prospect of Success

[11] Real prospect has been defined *ad nauseum* in several cases and so I will not go into the definition again except to say the First Defendant in order to succeed under this head must have more than an arguable defence. In seeking to determine whether the First Defendant has more than an arguable defence, I must consider whether the affidavit filed in support is meritorious and I must also consider the draft defence exhibited to the affidavit (see CPR 13.4(2) and 13.4(3).

[12] Mr Donovan Blake's affidavit in support of the application seeks to make the case for the First Defendant having a defence with a real prospect of succeeding. His evidence is that he is not denying being negligent in colliding into the rear of the motor vehicle in which the Claimant was driving but he is denying the claimant sustained injuries as a result of the accident and if he did in fact sustain injuries, he wishes the Court to determine the type and extent of those injuries.

[13] Mrs Stewart Linton, in her submissions, directed me to the decision of the Honourable Mr Justice Kirk Anderson who at paragraph 8 of his decision in ***Clifton Beckford v Winston Blackwood [2013] JMSC 162*** noted that when a claimant claims damages for negligence, if the defendant is to be found liable, it must be proven that the negligent actions of the defendant caused the claimant to suffer loss. Although the case before Justice Anderson was one dealing with the entering of judgment on admission, the principle of law is relevant to the issue I must consider in this application.

[14] Mr Neale argues that the First Defendant has not put forward a real defence. He relies on two cases ***B & J Equipment Rental Limited v Joseph Nanco [2013] JMCA Civ 2 and Russell Holdings Limited v L&W Enterprise Inc and ADS Global Limited 2016 JMCA Civ 29*** to substantiate his argument concerning the existence of an affidavit of merit to prove that the First Defendant does not have a real prospect of successfully defending the case. In the ***Nanco case*** reference was made to the case of ***Evans v Bartlam [1937] AC 473*** wherein Lord Atkin said that if a regularly obtained default judgment is to be set aside there must be an affidavit of merit which sets out evidence that the defendant has a *prima facie* defence. He directs me to paragraph 65 of the first instance decision in the ***Nanco case*** which reads as follows:

> *"According to Craig Osbourn (**Civil Litigation, Legal Practice Course Guides 2005-2006, p 364**), the defendant must file evidence to persuade the Court that there are serious issues which provide a real prospect of him successfully defending the claim. The evidence filed must set out the case in sufficient detail to satisfy the test".*

[15] Mr Neale argues that the First Defendant has not chosen to rely on any of the usual defences such as contributory negligence and that means it has no real prospect of successfully defending the claim. He argues that the substance of the defence should be set out in the affidavit supporting the claim and neither of the two affidavits filed in support of the First Defendant's application has set out a defence to the negligence claim. In fact, submits Mr Neale, paragraph 6 of Mr Blake's affidavit says that "liability for the collision cannot be successfully disputed" and to

say that there was an uncertainty as to whether the Claimant was injured in the accident is according to him, not enough to establish a defence with a real prospect of success. Mr Neale also points me to the fact that paragraph 4 of the draft defence says that liability for the collision is not being contested. He contends that if liability is not being contested there should not be a trial but an assessment of damages. He also submits that to be unaware of injuries caused is "the flimsiest defence to dispute quantum" and that being unaware of injuries caused is not the same as saying there are no injuries. He argues further that there is nothing in the affidavit in support challenging the medical report from the doctor.

[16] In referring to the ***Clifton Beckford case*** that is being relied on by the Defendant, Mr Neale argues that the cases are to be distinguished. In ***Clifton Beckford*** a defence was filed, in the case at bar no defence has been filed. In ***Clifton Beckford*** the issue concerned a defence of quantum, in the case at bar, the judgment is considering both the issue of quantum and liability. He argues that if the orders are made, his client will be prejudiced as the claim form was filed in 2018 and the application to set aside is being made in 2020. I will just point out here that the claim form was filed on May 28, 2018, the Request for Default Judgment was made on December 4, 2018 and judgment was entered on January 24, 2020. No assessment date has as yet been set. I also remind counsel for the Claimant that in setting aside default judgments, the Court counts days not from the filing of the claim form but from the date on which the defendant would have been notified that the default judgment has been entered. As I said earlier in my judgment there was no delay in the making of the application to set aside default judgment and so I am not of the view that the Claimant will be prejudiced if the default judgment is set aside.

[17] Mr Neale's focus on the driver's admission of liability is critical to his submissions. I however note that the admission is an admission to causing the accident. The driver, Mr Blake, is saying he ran into the back of the motor truck the Claimant was travelling in. He said the truck, which was much bigger than the motor vehicle he was travelling in had minor damages to the back step. He admits that the Claimant

complained of back pain (see paragraph 5 of the Affidavit of Donovan Blake) but he was uncertain that the Claimant was injured in the accident (see paragraph 6 of the Affidavit of Donovan Blake). It is this issue that the First Defendant is saying should be tried by the Court, whether the injuries allegedly sustained by the Claimant were as a result of the accident.

[18] "An admission of negligence without an admission that the claimant suffered injury is not an admission of liability" ***White Book 2009 page 383. In the case of Rankine v Garton Sons & Co Ltd [1979] 2 All ER 1185*** the defendant admitted that they were negligent but did not admit that the plaintiff's injuries resulted from their negligence. The court held that an admission of negligence was not necessarily an admission of liability and unless the defendant had in the pleadings admitted that the injuries caused were as a result of their negligence, then the issue of liability for injuries remained a live one.

[19] In the case at bar, paragraph 4 of the draft defence, reads:

> *"…The company is however unaware of the injuries, loss and damage allegedly suffered by the Claimant and puts him to strict proof of same".*

At paragraph 6, the draft defence reads:

[20] It is clear to me that the First Defendant is raising for consideration the issue of whether the Claimant was injured in the accident and if indeed he was, what was the extent of his injuries. It need not file a defence to the claim of negligence because it has admitted that his servant was negligent in the operation of the motor vehicle. The First Defendant should

> *"have the right to challenge the bona fides of the Claimant and to contest the issue whether in fact the injuries he suffered were caused by the incident which they admit took place, without saying so in plain and inevitably offensive terms."* ***(Rankine v Garton Sons & Co Ltd)***

[21] It appears to me from the affidavit filed to which the draft defence is exhibited that the First Defendant is intending to admit negligence but will deny damage. The Claimant should prove his damage with evidence, for the First Defendant is

intending to make it clear that a distinction is to be drawn between admitting negligence and admitting damage.

CONCLUSION

[22] I am of the view that the First Defendant should be given the opportunity to put forward a defence to deal with the issue of liability for injuries allegedly sustained by the Claimant. It has not delayed in making the application and has provided me with a good explanation as to why it failed to file an acknowledgment of service in time. I therefore order as follows:

a. The Second Defendant is removed as a defendant in the claim.

b. The last sentence of paragraph 5 of the Affidavit of Donovan Blake filed on February 14, 2019 is struck out.

c. The Default Judgment entered in Judgment Binder 774 Folio 325 on January 24, 2020 is set aside.

d. The Acknowledgment of service filed on February 14, 2019 and served on the Claimant's attorneys-at-law on February 15, 2019 is allowed to stand.

e. The Defendant is to file and serve a defence to the claim on or before October 23, 2020.

f. The parties are to attend mediation on or January 22, 2021.

g. Should mediation be unsuccessful the parties are to attend Case Management Conference on June 9, 2021 at 10:00 a.m for ½ hour.

h. Costs in the application in the amount of $65,000.00 are to be paid by the Defendant to the Claimant on or before November 30, 2020.

i. The Claimant's attorneys-at-law are to file and serve the Formal Order.