[2020] JMSC Civ 88

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012HCV03519

BETWEEN	**NOEL LEWIS**	**CLAIMANT**
AND	**MICHAEL GABBIDON**	**1ST DEFENDANT**
AND	**WINSTON GABBIDON**	**2ND DEFENDANT**

Appearances: Ms. Althea Wilkins instructed by Dunbar and Company for the Applicants, and Mrs. Myoka Hudson-Buchanan instructed by Kinghorn and Kinghorn for the Respondent.

Written submissions filed by Ms. Houston Thompson instructed by Dunbar and Company for the Applicants.

Heard February 20, 2020 and May 1, 2020.

Civil procedure – Application to set aside judgment in default – Whether the defendants have demonstrated that they have a real prospect of successfully defending the claim – Whether judgment was irregularly entered as a result of the signature of the claimant's attorney being affixed to the judgment in default order – Rules 13.2, 13.3 and 21.8 of the Civil Procedure Rules, 2002, as amended.

MASTER N. HART-HINES

[1] The claim in this matter arises from a motor cycle accident which occurred on October 24, 2011, at the intersection of Omaro Road and Hagley Park Road, Kingston. The claim form and the particulars of claim were filed on June 25, 2012 alleging negligence on the part of the 1st Defendant and alleging that he

was the servant and/or agent of the 2nd Defendant at the time of the accident. It is alleged by the Claimant that he was injured when a motor cycle licensed 3025H was so negligently operated by the 1st Defendant that he caused a collision with motor cycle licensed 8033G, which the Claimant was riding. The motor cycle licensed 3025H was owned by the 2nd Defendant.

THE APPLICATION

[2] By notice of application filed on August 20, 2015, Michael Gabbidon and Winston Gabbidon applied pursuant to rule 13.2 and 13.3 of the Civil Procedure Rules 2002, as amended (hereinafter "CPR") to have a judgment in default set aside. The default judgment was entered against them with effect from September 13, 2012 in Binder 756 Fol 186 after they failed to file an acknowledgement of service and a defence within the requisite periods after service of the claim form on them. The 1st Defendant, Michael Gabbidon, alleged in his affidavit filed on October 26, 2015 that he had not been personally served with the claim form as required by rule 5.3 of the CPR. The 2nd Defendant Winston Gabbidon accepted that he had been served but stated in his affidavit filed on September 14, 2015, that he had a good defence with a reasonable prospect of success.

[3] The application indicates that the following orders are sought:

1. *"The Judgment in default be set aside;*
2. *That the Defendants be granted permission for their Defences filed on May 3, 2013 and April 22, 2013 respectively to stand;*
3. *That the Acknowledgments of Service of Claim Form filed on May 3, 2013 and April 22, 2013 and served on May 9, 2013 and April 26, 2013 respectively to stand;*
4. *That the Defendants be granted any other relief as this Honourable Court deems just."*

[4] The application and the affidavits in support indicate that the Defendants seek to have the default judgment set aside on the basis that the 1st Defendant was not served personally with the claim form and accompanying documents and that the Defendants have a good defence with a real prospect of success. Further, it is alleged that it was the Claimant who was negligent as he operated

his bike and rode from Omaro Road, a minor road, onto Hagley Park Road, a major road and caused the collision between his bike and the 2nd Defendant's motor bike, which was being operated by the 1st Defendant at that time. It is also alleged that the 1st Defendant was not acting as the 2nd Defendant's servant or agent when the collision occurred and therefore the 2nd Defendant cannot be held vicariously liable for the 1st Defendant's acts or omissions.

THE HEARING

[5] At the time of hearing the application on February 20, 2020, counsel Ms. Althea Wilkins indicated that the application pursuant to rule 13.2 would not be pursued, since the 1st Defendant had passed away on February 1, 2017. However, it was submitted that the default judgment was irregularly entered in that the signature of the Claimant's counsel appears on the document. Counsel were permitted to file written submissions by April 6, 2020, in respect of this issue raised during the hearing, but not raised in the notice of application filed on August 20, 2015. At the time of delivering this judgment, submissions were only received from the Attorneys-at-Law for the Applicants, Dunbar and Company. No Amended Notice of Application has been filed in respect of the contention that the default judgment was irregularly entered.

ISSUES

[6] The issues for the consideration of this court therefore are:

1. Whether the defendants have demonstrated that they have a real prospect of successfully defending the claim; and
2. Whether the judgment in default was irregularly entered as a result of the signature of the claimant's attorney being affixed to the document.

CHRONOLOGY

[7] I now briefly set out the chronology of the salient events:

1. On October 24, 2011 the accident occurred.
2. On June 25, 2012 the claim form and particulars of claim were filed.
3. On September 13, 2012, the process server Petro Evans swore to an affidavit alleging that he served both defendants on July 4, 2012 at 6:12pm

at their home in the parish of St. Andrew. The affidavit of service was filed on the same date.

4. Judgment in default was entered against the defendants with effect from September 13, 2012. The document reflects that it was signed by a Deputy Registrar on February 12, 2013.
5. The defence of the 2nd Defendant was filed on April 22, 2013 along with an acknowledgement of service indicating that service was effected on the 2nd Defendant on July 5, 2012.
6. The defence of the 1st Defendant was filed on May 3, 2013 along with an acknowledgement of service indicating that service was effected on the 1st Defendant on July 5, 2012.
7. The notice of application was filed on August 20, 2015.
8. The 2nd Defendant's affidavit in support was filed on September 14, 2015.
9. The 1st Defendant's affidavit in support was filed on October 26, 2015.
10. The affidavit of Ruthann Morrison-Anderson, Legal Counsel, Advantage General Insurance Company Limited ("AGIC") was filed on November 11, 2015.
11. The judgment in default was served on the defendants' Attorneys on March 23, 2016.
12. On July 13, 2016 the 1st Defendant died.

SUBMISSIONS

[8] Counsel Ms. Wilkins submitted that there were issues which required the matter to be determined at a trial. First, the 1st Defendant was not acting as the 2nd Defendant's servant or agent at the time of the accident. Further, the court must have regard to the location of the accident and the fact that the Claimant was travelling from a minor road unto a major road while the 1st Defendant was travelling along the major road at the time of the accident. Counsel also asked the court to take into account the fact that the 2nd Defendant received compensation from the Claimant's insurance company in respect of his motor bike. Ms. Wilkins submitted that the defendants had a real prospect of success.

[9] Counsel Mrs. Hudson-Buchanan submitted that the 1st Defendant still owed a duty of care even if he was travelling along the major road at the time of the accident. Counsel submitted that the delay on the part of the defendants was inordinately long and insufficient reason was provided for the delay. Finally, it was submitted that in light of the death of the 1st Defendant, the Claimant would be prejudiced in not being afforded the opportunity to cross-examine the 1st Defendant.

THE LAW AND ANALYSIS

Should the default judgment be set aside under rule 13.3?

[10] The court may set aside a default judgment if the defendant has a real prospect of successfully defending the claim. **Rule 13.3** of the CPR provides:

> *"**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 has been 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."*

[11] Prior to the 2006 amendment to the Jamaican CPR, the old rule 13.3(1) provided that a Court might set aside a default judgment "*only if*" all three conditions in that rule were met, namely, a defendant had a real prospect of successfully defending the claim, he applied to the court as soon as is reasonably practicable and he gave a good explanation for the failure to file a defence. In ***Kenneth Hyman v Audley Matthews and Another*** SCCA No. 64/2003 and ***The Administrator General for Jamaica v Audley Matthews and Another***, SCCA No. 73/2003, (unreported) Court of Appeal, Jamaica, delivered on November 8, 2006, Harrison P said the three conditions were to be read cumulatively. That is not the position today. The Court of Appeal has since emphasised that in determining whether to set aside the default judgment, the "*foremost consideration*" is the defendant's prospects of success

(see ***Denry Cummings v Heart Institute of the Caribbean Limited*** [2017] JMCA Civ 34 at paragraph 66 per McDonald-Bishop JA).

[12] In ***Swain v Hillman*** [2001] 1 All ER 91 at 92, Lord Woolf MR said "*the words '… real prospect of succeeding' ... direct the court to the need to see whether there is a "realistic" to as opposed to a fanciful prospect of success*". It must be more than a merely arguable case. It must be a good defence in fact or in law, or both. It is well settled that in determining whether there was a real prospect of success, the court must give consideration to the claim, the nature of the defence, issues of the case, and whether there is a good defence on the merits with a realistic prospect of success. However, in considering the issues of the case while hearing the application, the court is not to conduct a mini trial.

Is there a defence with a real prospect of success?

[13] I have carefully considered the affidavits filed by the Defendants. Having considered the affidavits of the Defendants and the draft defence, it seems to me that a motorist or cyclist traversing from a minor road unto a major road would owe a duty of care to other road users travelling along the major road. The draft defence of the 1st Defendant has a real prospect of success. Also, for liability to be vested in the 2nd Defendant, the 1st Defendant would have to be his servant or agent. This question of fact having been denied, it ought to be determined at a trial.

[14] It seems that the following issues are to be determined by a judge at trial:

1. Whether the 1st Defendant was a servant or agent of the 2nd Defendant.
2. Whether the Claimant travelled from a minor road to a major road and what precautions he took before so doing.
3. Whether there was negligence on the part of the Claimant and 1st Defendant which caused or contributed to the accident.

[15] There are clearly issues in the case which require a determination at a trial, and the defence has a real prospect of success. It is noted that he 1st Defendant is deceased. However, Ms. Thompson indicated that reliance

would be placed on a witness statement prepared by the 1st Defendant prior to his death, and if necessary, other witnesses might be called at trial.

The explanation for the delay and the length of the delay

[16] Mrs. Morrison-Anderson's affidavit explained that though the 2nd Defendant took the claim form and other documents which were served on him to AGIC on July 6, 2012, there was an administrative error by AGIC which caused the delay in filing the defence. It was stated that though the served documents were forwarded to the AGIC Legal Department, no action was immediately taken by that department as the relevant file was being reviewed by the Claims Department in respect of a claim made by the 2nd Defendant against the Claimant. The file was to be sent to the Legal Department after the Claims Department had completed its review and handling of the claim, but it was inadvertently archived and the error was not observed by the Legal Department until months had passed. There was therefore approximately an eight-month delay in the filing of the defence by each Defendant.

[17] The court must consider not only the length of the delay but also the reason for it. The reason is simply that the Legal Department at AGIC failed to ensure that the acknowledgments of service and the defences were filed in time. It is settled law that a party should not be deprived of having his/her case heard on the merits on account of the errors or inadvertence made by his/her Attorney-at-law (see ***Merlene Murray-Brown v Dunstan Harper et al*** [2010] JMCA App 1 at paragraph 30, per Phillips JA). While I do not find the explanation for the delay to be satisfactory, the main consideration for the court, as stated in rule 13.3(1) of the CPR, is whether a defendant has a real prospect of successfully defending the claim. The main consideration in rule 13.3 has been satisfied.

Is there any likely prejudice to the claimant?

[18] In ***Philip Hamilton (Executor in the Estate of Arthur Roy Hutchinson, Deceased, testate) v Fredrick Flemmings & Gertrude Flemmings*** [2010] JMCA Civ 19, at paragraph 41, Phillips JA accept the views expressed in

Finnegan v Parkside Health Authority [1998] 1 W.L.R. 411, that a litigant ought not to be denied access to justice on account of a procedural default,

> *"even if unjustifiable, and particularly where no prejudice has been deponed to or claimed."*

[19] There has been a seven-year delay in the progression of this matter. Delay may cause prejudice to a claimant because with the passage of time, memories fade, or it might be difficult to locate witnesses, or witnesses might have died. The claimant has the burden of proving prejudice. However, no actual prejudice has been proven. Despite the lengthy delay in the progression of this matter, I do not find that there is any prejudice to the claimant.

The overriding objective

[20] The overriding objective of the CPR requires that the court dispense justice by resolving issues between the parties in a manner which saves time and expense. In ***Villa Mora Cottages Limited and Monica Cummings v Adele Shtern***, SCCA No. 49/2006, (unreported) Court of Appeal, Jamaica, judgment delivered on the 14th December, 2007, at page 10 Harris JA said:

> *"It cannot be disputed that orders and rules of the Court must be obeyed. A party's non-compliance with a rule or an order of the Court may preclude him from continuing litigation.* ***This, however, must be balanced against the principle that a litigant is entitled to have his case heard on the merits****. As a consequence, a litigant ought not to be deprived of the right to pursue his case."* (Emphasis mine)

[21] In light of the defence advanced, the matter must be determined on its merits.

What is the effect of the judgment in default being signed by counsel?

[22] The submission was made by counsel for the Defendants that the judgment in default should be set aside as of right under rule 13.2 on the basis that it was defective by virtue of the signature of the Claimant's counsel appearing on it. Counsel for the Defendants have not provided any authority on this point, and no submissions were received from Counsel for the Claimant.

[23] The CPR is more concerned with substance rather than form. Therefore, in my view, it is not fatal that the Claimant's counsel signed the judgment in default,

so long as the Registrar or Deputy Registrar affixed her signature thereto. It would have been more appropriate for a requisition to be issued for the Claimant's counsel to refile the default judgment without affixing his signature. Notwithstanding, I do not find that the default judgment is defective. It seems to me that a default judgment would be set aside *debito justitiae* where something fundamental affects the ability of a defendant to get notice of the claim against him, and information to assist him to comply with the CPR. That is not the case here.

DISPOSITION AND ORDERS

[24] In all the circumstances, it seems appropriate that the judgment in default entered against the Defendants be set aside on the ground that there is a defence has a real prospect of success. Having regard to the fact that the progression of this matter has been protracted, I will fix the matter for trial at this juncture, and the parties will return to Court for the Case Management Conference at which time other orders will be made. Mediation will be ordered dispensed with, having regard to the death of the 1st Defendant. However, the parties' attorneys-at-law are encouraged to continue discussions with a view to settling this matter.

[25] Despite the death of the 1st Defendant it is apparent that the 2nd Defendant wishes to rely on the defence filed by the 1st Defendant regarding how the accident occurred. No application has been made for the substitution of a personal representative for the deceased party. Notwithstanding, the Court has authority to order substitution (see CPR rule 21.7 and 21.8).

[26] CPR rule 21.8 states that where a party to proceedings dies, the Court may give directions to enable the proceedings to be carried on, whether or not an application has been made to the Court. CPR rule 21.7 states the Court may make an order appointing someone to represent the deceased person's estate for the purpose of the proceedings.

[27] It is unclear whether or not 1st Defendant has a personal representative. In

order to ensure that this matter progresses in a timely manner, it is this Court's responsibility to address the issue of the death of the 1st Defendant. However, the Court must be seized of adequate information in order to appoint someone to represent the deceased 1st Defendant's estate, if this order is necessary. I will therefore give directions for steps to be taken for the appointment of someone to represent the 1st Defendant's estate.

[28] In light of the foregoing, I make the following orders:

1. The judgment in default entered against the Defendants in Binder 756 Fol 186 is set aside.
2. The acknowledgments of service and defences filed on behalf of the Defendants filed on April 22, 2013 and on May 3, 2013 are permitted to stand.
3. An affidavit must be filed and served by the Attorneys-at-Law for the 1st Defendant no later than June 30, 2020, exhibiting a copy of a death certificate and providing information regarding whether the 1st Defendant died intestate, and whether any person is interested in representing his estate.
4. If no application is filed in the Supreme Court of Jamaica by July 17, 2020, to have a representative appointed in respect of the estate the 1st Defendant, the Administrator General shall be appointed as the representative of the estate at the hearing of the Case Management Conference.
5. Mediation is ordered dispensed with.
6. Case Management Conference is fixed for hearing on October 29, 2020 at 11 a.m. for half hour.
7. The parties are to attend the Case Management Conference.
8. Trial is fixed for October 24, 2022 before judge alone in open court.
9. Costs to the Claimant to be agreed or taxed.
10. The Attorneys-at-Law for the applicants/defendants are to prepare, file and serve this order on the Attorneys-at-Law for the respondent/claimant and the Administrator General. Permission is granted for the service of this Court order electronically.