



[2022] JMSC Civ 106

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2010HCV02049

BETWEEN	LYDFORD MINING COMPANY LIMITED	CLAIMANT
AND	FITZ WILDMAN	1ST DEFENDANT
AND	FERRON THOMAS	2ND DEFENDANT

IN CHAMBERS

Mrs Camille Wignall - Davis, instructed by Nunes, Scholefield, DeLeon & Co. for the claimant.

Mr Hugh Wildman instructed by Hugh Wildman & Company for the 1st defendant.

Heard May 17, 2022, July 1, 2022 and July 8, 2022

Setting Aside Default Judgment under CPR 13.2. Whether the 1st defendant has proven on a balance of probabilities that he was not served with the claim form and particulars of claim

CORAM: JARRETT, J (Ag)

ORAL JUDGMENT

Introduction

[1] The 1st defendant, Mr Fitz Wildman, filed a Notice of Application to set aside default judgment on August 13, 2021. It is supported by an affidavit sworn by him on August 8, 2021 and filed on August 13, 2021. The judgment in default of acknowledgment of service was entered on January 20, 2011. Despite the Notice

of Application indicating that the 1st defendant has a real prospect of successfully defending the claim and that he was not served with the claim form and the particulars of claim, the arguments advanced on his behalf clearly demonstrated that the basis on which he challenges the default judgment is that there was no service of the claim form and the particulars of claim on him. Besides, his affidavit in support gives no evidence of what his defence to the claim is and there is no draft defence exhibited thereto. Had he intended to argue that he had a defence with a real prospect of success, CPR 13.3 and 13.4 required him to include in his affidavit; evidence of his proposed defence, and to exhibit a draft defence. It is clear, although not expressly stated in his Notice of Application, that he relies on CPR 13.2(1)(a).

- [2] The application first came before me on May 17, 2022, at which time, Mr Hugh Wildman for the 1st defendant began his submissions. Midway through those submissions, counsel Mrs Wignall-Davis alerted me to the affidavit of Ms Zoe Ireland filed on that same day and sworn on behalf of the claimant, by which she indicates that the process server Ms. Corinthia Chen who swore an affidavit of service in relation to the claim form and particulars of claim cannot be located. In that affidavit Ms Ireland outlined the various attempts made to find Ms Chen including the use of social media platforms. After hearing from both counsel, on the need for cross examination of both Ms Chen and the 1st defendant having regard to their conflicting evidence in relation to the service of the claim form, I adjourned the application to allow the claimant an opportunity to make further attempts to locate Ms Chen. I ordered that both Ms Chen and the 1st defendant appear on the adjourned date to be cross examined.
- [3] The matter was adjourned to June 27, 2022 but did not appear on the court's list on that day and so I further adjourned it to July 1, 2022. On June 24, 2022, an affidavit of Michelle Campbell was filed on behalf of the claimant in which she states that despite a notice published in the newspaper, requesting information on the whereabouts of Ms Chen, the claimant has still been unable to find her.

[4] The matter therefore resumed before me on July 1, 2022. I declined Mrs Wignall - Davis' application to cross examine the 1st defendant in the absence of Ms Chen herself being available for cross examination. That application was opposed by Mr Wildman. My ruling on this issue was based on the fact that both Ms Chen's credibility and that of the 1st defendant would need to be tested on cross examination; and in the absence of Ms Chen, the justice of the case could not be met by cross examining only the 1st defendant. Such a course would, in my view, deny the defendant an opportunity to test the evidence of Ms Chen.

Counsel's Submissions

[5] Both counsel relied on written and oral submissions. In his submissions, Counsel Mr Hugh Wildman argued that the affidavit of Ms Chen was deficient in that she did not satisfactorily establish the identity of the 1st defendant. He said the identity of the 1st defendant was not known to her, and she essentially relied on impermissible hearsay evidence to determine who he was. He argued that on the claimant's own evidence, there has not been established that the 1st defendant was in fact served. Counsel relied on the decision of Sykes J (as he then was) in **Tarzan Mighty v Michael Wilson and Oneil Marshall, decided on February 23, 2005**, in which the importance of service on a defendant of the claim form and particulars of claim was reemphasised. Counsel warned about the importance of proper identification in these types of circumstances and the care a court must take.

[6] Mr Wildman took me to paragraphs 6, 7 and 8 of the affidavit of Ms Chen. These paragraphs read as follows: -

6. That on the 10th day of June 2010 I visited the district of Kilancholly in the parish of St. Mary to serve the first defendant Fitz Wildman with the claim form and particulars of claim.
7. That I made enquiries in the Kilancholly District of the whereabouts of the 1st defendant and was shown by citizens a bar where the 1st defendant frequents.

8. That I called the 1st defendant 's name and he answered.

Counsel asked rhetorically in relation to paragraph 8- where is the evidence that the 1st defendant answered?

- [7] Reference was then made to paragraphs 4, 5 and 6 of the affidavit of the 1st defendant. It was argued that the 1st defendant is quite clear that he was not served. He questioned why documents including the claim form were sent to the 1st defendant by registered post when the claimant contends that he was personally served. It was argued that once there was no proper service, I have no choice but to set aside the judgment. Mr Wildman said I have no discretion in the matter, the default judgment cannot stand, the rules require service and the claimant must prove that the claim form and the particulars of claim were served.
- [8] Mrs Wignall-Davis submitted that the claimant is not disputing that there is a requirement to prove service. She said that it is indeed settled that if non-service is proved on a balance of probabilities, the 1st defendant is entitled to have the default judgment set aside. She cautioned that the court has to be satisfied on a balance of probabilities that there was no service. In her view, the affidavit evidence of the 1st defendant does not meet that standard.
- [9] In turning to the affidavit of service of Ms Chen, Mrs Wignall-Davis argued that it met all the requirements of CPR 5.5 in terms of what is required for personal service. She contended that contrary to Mr Wildman's submissions, the fact that Ms Chen did not know the 1st defendant was not fatal. She reiterated that Ms Chen's affidavit meets the requirement of CPR 5.5 in relation to where service took place and how the 1st defendant was identified. According to Mrs Wignall-Davis, there is no dispute that Kilancholly District in St. Mary is the address where the 1st defendant resides. Ms Chen says in her affidavit that she went to that district and made enquires about the 1st defendant's whereabouts, was directed to a bar, she went to the bar and there she called out his name and the 1st defendant admitted that he was Fitz Wildman.

[10] Comparing Ms Chen's affidavit with that of the 1st defendant, Mrs Wignall-Davis argued that the 1st defendant has only provided a bare denial that he was not served after waiting several years to do so. She pointed out that he has acknowledged that he received a letter and other documents by mail which were in fact sent to the very same address: Kilancholly District, St Mary. In support of this submission, counsel directed me to the affidavit of service of Anthony Bentley filed on April 7, 2014, in which he depones that on March 18, 2014, a copy of the default judgment and notice of adjourned hearing for assessment of damages scheduled for April 9, 2014, were sent by registered mail to the 1st defendant. In closing, counsel argued that there is insufficient evidence on a balance of probabilities that the 1st defendant was not served with the claim form and particulars of claim. On the other hand, she argued that the circumstances of this case are sufficient to lead to the conclusion, on a balance of probabilities, that the 1st defendant was in fact served. Counsel contrasted the 1st defendant's bare denial with the evidence given by the defendant in **Tarzan Mighty v Michael Wilson and Oneil Marshall**, which was described by Sykes J as "going beyond simply asserting that he was not served".

Analysis and Discussion

[11] With conflicting evidence of the process server and the 1st defendant, and in the absence of cross examination, I must carefully weigh the affidavit evidence of both these witnesses and determine on a balance of probabilities whether the 1st defendant was not served with the claim form and the particulars of claim. I agree with Mr Wildman, that if the claim form and the particulars of claim were not served on the 1st defendant, the default judgment would have been irregularly obtained and I must set it aside. It is elementary that he who asserts must prove and so it is the defendant who has the burden to prove on a balance of probabilities that he was not served personally with the claim form and the particulars of claim. (See for example **Kathleen Williams v Devern Lee [2021] JMSC Civ 35**)

[12] Although Ms Chen did not know the 1st defendant, her evidence is that on June 10, 2010 she went to the district of Kilancholly, in St Mary asked citizens about the

1st defendant; was shown a bar that he frequents; she went to the bar; called out for him and he answered. She handed him the claim form and particulars of claim and he accepted them and admitted that he was the 1st defendant.

[13] In his affidavit in support of his application to set aside the default judgment, the 1st defendant repeats the above evidence given by Ms Chen, and merely says that he denies the assertions she makes that he was served. Paragraphs 6, 7 and 8 of the 1st defendant's affidavit are as follows: -

6. The applicant denies the assertions of Ms Chen that he was served with the claim form and particulars of claim in this matter.
7. The applicant asserts that he became that he became a party to the claim herein when he received a letter in the mail bearing the claim number herein, and he took the letter to his attorney at law who informed him that a claim was initiated against him, the court awarded the claimant judgment in default of an acknowledgment of service and defence and the court's next step was to assess damages.
8. The applicant asserts that had he been served with the claim form and particulars of claim as claimed by the deponent Corinthia Chen he would have sought legal advice then and filed the Acknowledgement of Service and Defence.

I agree with Mrs Wignall-Davis that this is a bare denial. The 1st defendant does not say for example that he was not at any bar on June 10, 2010; or why he could not have been served as contended by Ms Chen; or for that matter where he was on June 10, 2010. He acknowledges that he received the correspondence sent to him by registered mail to his Kilancholly District address, but what is markedly absent from his affidavit is any indication of when he received these documents. He has not challenged the accuracy of the affidavit of service of Anthony Bentley, who says that the default judgment and the notice of the assessment of damages

were sent by registered post to him on March 18, 2014. I therefore accept as a fact that these documents were posted as stated by Anthony Bentley, and that service is deemed to have been effected on the 1st defendant in accordance with the deeming provisions of CPR 6.6 on April 8, 2014. Based therefore on his own evidence, the 1st defendant would have taken the documents to his attorney -at-law after he received them in April 2014 and was advised what the documents were and what they meant.

[14] Having received the default judgment from as long ago as April 2014, the 1st defendant gives absolutely no evidence explaining why he took nearly seven years to seek to set aside the judgment on the basis that he was not served with the claim form and the particulars of claim. The court's records indicate, and both counsel acknowledged during the hearing that when the matter was before the court on October 15, 2014 for the assessment of damages, the court was informed that counsel had been retained for the 1st defendant. That was almost eight years ago.

[15] The absence from the affidavit of the 1st defendant of evidence in relation to:

- a) why he contends that Ms Chen's evidence is false,
- b) when he received the default judgment and the notice of assessment of damages by registered mail at his Kilancholly District address, and;
- c) why he took almost seven years to apply to set aside the default judgment on the basis of lack of service;

are gaps one would expect the 1st defendant to be in a position to fill, yet he has not done so. This is remarkable, given that the burden is on him to prove that he was not served with the claim form and the particulars of claim and that as a consequence the default judgment ought to be set aside as of right.

[16] It is undisputed that the 1st defendant lives at Kilancholly District in St Mary. It is unchallenged that deemed service of the default judgment and the notice of

assessment of damages was April 8, 2014. With the bare denial, the gaps in his evidence and the unchallenged evidence that he received the registered post addressed to him at Kilancholly District in St Mary in April 2014, I am not satisfied on a balance of probabilities that he was not served with the claim form and the particulars of claim. I therefore refuse his application.

Conclusion

[17] I make the following orders:

- a) The 1st defendant's application to set aside the default judgment is refused.
- b) Costs to the claimant to be agreed or taxed.