[2021] JMSC Civ 30

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2019CV00412

BETWEEN	**STEVE LYEW**	**CLAIMANT/ RESPONDENT**
AND	**TROPICAL TOURS LIMITED**	**APPLICANT/ DEFENDANT**

IN CHAMBERS

Mikhail Williams instructed by JNW Taylor & Associates for the Applicant/Defendant

Faith Gordon instructed by Hugh Wildman & Company for the Claimant/Respondent

Heard: May 17, 2021 and June 23, 2021

Application for extension of time to file Defence – Mandatory setting aside of Default Judgment – Rules 10.3(9) and 13.2(1)(b) of the Civil Procedure Rules (CPR)

MASTER P. MASON

BACKGROUND

[1] There is presently one application before the court for an extension of time to file a defence.

[2] On the 8th of February 2019, the claimant, a Bus Tour Operator, filed a claim form with particulars of claim alleging breach of contract and requesting the sum of Nineteen Thousand Four Hundred and Forty United States Dollars (US $19,440.00). He claims that there was an oral contract for him to provide transportation services to tourists from the Sangster's International Airport to

various hotels in Montego Bay and Negril. He further asserts that the defendant failed to compensate him according to the terms of their agreement from December 2013 to April 2016.

[3] The defendant, a company duly incorporated in Jamaica, filed an acknowledgment of service on March 11, 2019. On April 10, 2019, the defendant filed a Request for Information pursuant to Part 34 of the CPR and an application for extension of time to file a defence. The application for extension was initially set to be heard February 27, 2020. It was then rescheduled for May 17, 2021.

[4] The claimant, on 12 August 2019 filed a request for default judgment. Default judgment was entered on October 24, 2019. The hearing for Assessment of Damages was scheduled for March 17, 2021.

ISSUES

[5] The issues to be decided are –

i) Whether the default judgment was entered in accordance with Rule 12.5 of the CPR; and

ii) Whether time should be extended for the defendant to file a defence.

SUBMISSIONS

Claimant

[6] By way of affidavit evidence of Indira Patmore filed on March 15, 2021, the claimant argues that the defendant has no realistic prospect of successfully defending the claim. She believes that the defendant's questions posed under Part 34 of the CPR were answered in a letter dated April 10, 2019 sent by counsel for the claimant and the request for information did not prevent the defendant from filing a defence on time.

[7] Additionally, the claimant was unaware of the defendant's application to extend time to file a defence. This application was not supported by any affidavit at the time it was filed. The fact that the affidavit in support was only filed February 17, 2020 shows that defendant has no realistic prospect of success.

Defendant

[8] The defendant relies on the affidavit of Mikhail Williams filed February 17, 2020. He states that the primary ground for the application to extend time to file a defence is the necessity of obtaining answers from the claimant pursuant to the Request for Information filed under Part 34. Not obtaining these answers would severely prejudice the defendant in the preparation of its defence as it cannot admit the whole or part of the claim neither on the issue of liability nor quantum.

[9] The defendant has also highlighted that the default judgment obtained by the claimant is a breach of Rule 13.2(1) (b) and the claimant has not complied with Rule 8.7(5) of the CPR.

[10] Finally, three cheque payment vouchers were exhibited showing payment made to the claimant in 2015 and 2016. These allegedly represented a part of the defendant's defence although a draft defence could not be put before the court at this time.

ANALYSIS

Issue #1: Whether the default judgment was entered in accordance with Rule 12.5 of the CPR

[11] Rule 13.2(1)(b) mandates that the court set aside a default judgment where any of the conditions in Rule 12.5 are not satisfied. Rule 12.5 (e) requires that a default judgment should only be obtained where there is no pending application for an extension of time to file the defence. This is in stark contrast to Rule 13.3 which compels the court to determine whether a defendant has a real prospect of successfully defending the claim.

[12] The defendant had filed a notice of application for court orders on April 10, 2019 requesting the time to file a defence be extended. The hearing of the application was scheduled for February 27, 2020. The request for default judgment was filed August 12, 2019 and entered October 24, 2019.

[13] It is clear from the aforementioned that the default judgment was contrary to Rule 12.5(e) and must be set aside. This does not involve the issue of whether there is a real prospect of success.

Issue #2: Whether time should be extended for the defendant to file a defence

[14] Rule 10.3(9) permits a defendant to apply for an order extending the time for filing a defence. The general rule is that an applicant need not give evidence in support of an application for court orders unless required by a rule, practice direction or court order (Rule 11.9(1)). Such evidence in support must be contained in an affidavit (Rule 11.9(2)).

[15] The defendant initially filed no affidavit in support of the notice of application for court orders requesting an extension to file a defence. There was also no draft defence. In his notice, however, it was made clear that the primary ground for the application was that information from the claimant, in accordance with Part 34, was required for the defence to be prepared.

[16] The Court of Appeal in **Dale Austin v the Public Service Commission and the Attorney General of Jamaica** [2016] JMCA Civ 46 outlined the factors that the court should consider when exercising its discretion to extend the time in which a defendant is to file a defence. First, it is imperative that the court be mindful of the overriding objective as each case is to be decided on its own facts. Second, the dicta of Lightman J in **Commissioner of Customs & Excise v Eastwood Care Homes (Ilkeston) Limited and Ors** [(2000) Times, 7 March (delivered 18 January 2000)] was reiterated:

> *"In deciding whether an application for extension of time was to succeed under rule 3.1(2) it was no longer sufficient to apply a rigid formula in*

> *deciding whether an extension was to be granted. Each application had to be viewed by reference to the criterion of justice.*
>
> *Among the factors which had to be taken into account were the length of the delay, the explanation for the delay, the prejudice of the delay to the other party, the merits of the appeal, the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that they were there to be observed and the resources of the parties which might, in particular be relevant to the question of prejudice."*

Length of the delay

[17] The claim form was served on the 27 February 2019 and the application to extend was filed April 10, 2019. A defendant is expected to file a defence 42 days after service of a claim form (Rule 10.3(1)). As such, there was in fact no delay as the defendant filed his notice of application within the period for filing his defence.

Explanation for the delay

[18] No affidavit was presented with the initial filing of the application. However, the affidavit in support was subsequently filed on February 17, 2020, it expounds on the primary ground given in the notice, that is, information is needed from the claimant.

[19] In the context of this case where sums are claimed and the defendant asserts that dates and names are needed to adequately answer the claim, I find that the reason given is satisfactory. This court also adopts the dicta of F Williams JA in **Dale Austin** (supra) at paragraph 42 that '*even in cases where no reason is provided, or a poor reason is given, that factor by itself is not conclusive in the application being refused'.*

Prejudice of the delay to the other party and resources

[20] In weighing the scales of justices and considering the overriding objective of dealing with cases justly, the court believes that the prejudice to the claimant in granting the application to extend seems to be less than the prejudice to the defendant should it be refused. If the application is refused, the defendant will have

no opportunity to refute the claimant's assertion to such significant sums of money. The issues of this case are not complex; however, the court is tasked with dealing with matters justly and in this case, that means, establishing how much, if any, is in fact owed to the claimant. Providing the defendant the opportunity to file its defence will assist the court in achieving its mandate. The financial position of both parties may not be equal, but it should be noted that the claimant will be compensated with costs and interest.

Merits

[21] No draft defence was exhibited to the affidavit in support of the defendant's application for extension of time to file a defence. This, however, does not preclude the court from exercising its discretion as long as there is satisfactory explanation on the efforts made to secure the evidence concerning the element of merit and the reason for its absence. I adopt the words of Brooks JA in **The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr (a minor) by Rashaka Brooks Snr (His father and next friend) [2013] JMCA Civ16:**

> *[19] In our view, it is only just that a defendant who expects to be able to file a defence, but anticipates that he will not be able to file it within the time prescribed, or realises that the time prescribed has passed, should not be shut out, as of course, from being able to apply successfully for an extension of time.*
>
> *[20] It may reasonably be argued that, if his application is to be considered, he is then placed in a better position than a defendant who has been able to produce a draft defence and, therefore, has that defence subjected to the scrutiny of the court. We certainly would not wish to open the floodgates for applications without evidence of merit to be made in an attempt to cure the sloth of attorneys-at-law or the parties whom they represent.*
>
> *[21] For that reason, it is our view that it is only in special circumstances that such an application should succeed. A defendant who has not produced evidence of merit should only be successful if he were able to convince the court that it would be just to extend the time. The decision should lie within the discretion of the judicial officer hearing the application. Without laying down any mandatory criteria, such an application should address the issues identified by Lightman J and explain to the satisfaction*

> *of the court the efforts made to secure the evidence concerning the element of merit and the reason for its absence."*

[22] In filing the application for extension, the defendant had also filed a request for information pursuant to Part 34 concerning the following:

> *A)…equivalent sum in Jamaican currency, the date(s) and basis on which the calculation was made.*
>
> *B) The dates on which each of the relevant invoices were presented to the defendant and to whom specifically (if possible) the said invoices were presented.*

[23] Counsel for the defendant submitted that both limbs are required to properly prepare a defence. Counsel for the claimant in a letter dated April 10, 2019 gave no direct answers to the questions as he merely reiterated that the claimant was always paid in US currency and the particulars of claim exhibit SL 1 showed the dispatcher to whom invoices were presented.

[24] It should be noted that Rule 34.4 of the CPR requires that answers given under Part 34 must be verified by a certificate of truth in accordance with Rule 3.12. The claimant failed to comply with this rule in issuing his letter dated April 10, 2019.

[25] This court finds that question 1, although required by the CPR, has no bearing on the ability of the defendant to prepare a defence. This argument has no merit.

[26] Regarding question 2, upon perusing exhibit SL1, it is not clear to this court who was presented with invoices and when. The affidavit of Ms. Patmore states that Ms. Coote received the invoices. The letter signed by claimant's counsel speaking of presentation to a dispatcher seems to contradict Ms Patmore's assertion of presentation to Ms. Coote. There is also no answer as to the exact dates of presentation of the invoices, however Ms. Coote stated that the invoices were presented weekly. The defendant argued that the answers to this question are necessary in order to investigate and trace the relevant accounts and adequately prepare its defence. Presently, it can neither admit nor deny the claim. The arguments concerning question 2 are compelling as the court needs all relevant

evidence before it to justly deal with this matter and this can only be done when the defendant in fact knows which representative liaised with the claimant and when.

[27] The defendant has presented copies of 3 cheque payment vouchers dated 20/5/2016, 1/4/2016 and 20/11/2015. The claimant asserts that he knows nothing of these vouchers and his name could have easily been placed on them. The court finds that these vouchers raise significant questions as the claimant was unequivocal that he received no payment from November 30, 2013 to May 2016. This court, therefore, finds that although the defendant has not been able to join issue with the claim in every material particular, there is sufficient merit based on information presented to the court which raises triable issues based on quantum.

Effect on public administration and the importance of compliance with time limits

[28] Time limits should be adhered to by parties and court resources must be allocated appropriately based on the overriding objective. I find it disconcerting that default judgment was entered when there was a hearing date on extension to file a defence set for February 2020. This led to over a year being wasted. How could this have happened? Nonetheless, the issues presented necessitate the allocation of an appropriate share of the court's resources.

[29] I therefore find that based on all the circumstances, the defendant should be given the opportunity to file a defence.

ORDERS:

i) The claimant is to provide the answers to the request for information pursuant to Rule 34.4 of the CPR on or before July 9, 2021.

ii) The default judgment entered on October 24, 2019 is set aside.

iii) The defendant is permitted to file and serve its defence on or before July 21, 2021.

iv) Case management conference is fixed for September 30, 2021 at 10:30 am for ½ hour.

v) Costs of this application to be costs in the claim.

vi) The applicant/defendant's attorneys-at-law shall prepare, file and serve this order.

vii) Leave to appeal is denied.