[2019] JMSC Civ 266

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011HCV00772

BETWEEN	**GREGORY MAYNE**	**CLAIMANT**
AND	**JULIE RIETTIE ATHERTON**	**DEFENDANT**

Mr. John Graham and Ms. Peta-Gaye Manderson instructed by John Graham & Company for the Claimant.

Mr Nigel Jones and Ms. Kashina Moore instructed by Nigel Jones & Company for the Defendant.

IN CHAMBERS

ORAL JUDGMENT

Heard: January 31, 2019; March 14, 2019; May 8, 2019 and December 19, 2019

Default Judgment - Application to set Aside – Whether Default Judgment should be set aside as of right – Whether defendant has a real prospect of successfully defending the claim - Rules 13.2 and 13.3 CPR.

HENRY- McKENZIE J (AG)

Background

[1] This matter concerns an application to set aside a default judgment entered against the defendant in favour of the claimant on the June 17, 2011 for failure to file an Acknowledgment of Service.

[2] The claimant had filed a Claim Form and Particulars of Claim against the defendant on February 16, 2011. Evidence by way of an Affidavit of Service which was filed by the claimant, indicated that the defendant was served with the originating documents on March 23, 2011 at 1:15 p.m at her residential address at 12 Norbury Drive Kingston 8 in the parish of St. Andrew, by Kenton Aiken, a process server. This Affidavit of Service was filed on June 3, 2011. A supplemental Affidavit of Service was filed by the claimant on November 22, 2012, which amplified the Affidavit of Service filed on June 3, 2011.

[3] The defendant having failed to file an Acknowledgment of Service, an application was filed by the claimant requesting judgment in default of acknowledgment of service, on June 17, 2011.

[4] Default judgment was entered against the defendant on June 17, 2011. The claimant in an attempt to enforce the default judgment, made an application on July 16, 2014, for a charging order over the defendant's property. At this hearing, it was agreed by the claimant that he would take no further steps in enforcing the judgment against the defendant before September 30, 2014. The said September 30, 2014 was the date promised by the defendant to complete payment of the judgment sum.

[5] An Acknowledgment of Service was filed on behalf of the defendant on June15, 2016, which indicated that she was served with the originating documents on March 23, 2011. This Acknowledgment of Service was signed by her then Attorney-at-Law, Mrs Pauline M. Brown-Rose.

[6] The defendant through her Attorneys-at-Law now on record, caused a Notice of Application to Set Aside Default Judgment to be filed on January 18, 2018, seeking orders, inter alia, that the process server who allegedly served the documents on her, attend court to be cross-examined and for the default judgment to be ultimately set aside.

[7] The grounds upon which this application is sought, are that the defendant was not served and in the alternative, that she has a real prospect of successfully defending

the claim. Further, that she applied to the court as soon as it was reasonably practicable and that she has a good explanation for not filing the Acknowledgment of Service. The defendant relies on her affidavits filed on February 13, 2018 and February 21, 2018 in support of her application.

[8] The claimant also filed an Amended Notice of Application for Court Orders on April 4, 2018, seeking a declaration that the defendant is estopped from contending that she was not served with the Claim Form and Particulars of Claim. Further, that the defendant's application to set aside the default judgment be dismissed as an abuse of process of the court and for costs in the application.

DEFENDANT'S SUBMISSIONS

[9] The defendant has resisted the claimant's contention that she was served with the Claim Form and Particulars of Claim and the other pertinent documents. The defendant is seeking to substantiate this contention by relying on her absence from the jurisdiction at the material time, which she says is evidenced by her passport.

[10] The defendant has placed reliance on rule13.2 of the Civil Procedure Rules (CPR), which deals with situations in which the court must set aside a default judgment. The defendant has asserted that this a right to which she is entitled, and that any steps taken thereafter should be regarded as a nullity. Reliance was placed on the cases of **Craig v. Kanssen** [1943] KB 256 and **Strachan v. Gleaner Co Ltd and Another** [2005] UKPC 33.

[11] The defendant specifically pointed out that rule 13.2 does not have a timeline in which an application to set aside a default judgment is to be made, and as such, she ought not to be estopped from asserting that she was never served.

[12] The defendant prayed in aid the judgment of McDonald Bishop J, as she then was, in the case of **Fletcher & Company Limited v. Billy Craig Investments Limited** [2012] JMSC Civil 128, where she undertook a discourse of the different types of estoppel. The defendant thereafter concluded that that none of them applied to her case.

[13] The defendant further submitted, that the application would not amount to an abuse of process. In that regard, she relied on the judgment of Sykes J, as he then was, in the case of **The Assets Recovery Agency v. Andrew Hamilton and Others** [2013] JMSC Civ 136.

[14] The Defendant is of the view that the proceedings which took place prior to her application were enforcement proceedings and are therefore of no moment to her present application to set aside the default judgment. As such, she ought not to be penalised for failing to raise the issue of service at an earlier time.

[15] She argued further, that in accordance with rule 13.3 of the CPR, she has a real prospect of successfully defending the claim in that she did not enter into any agreement with the claimant, neither did she receive any money from him. Further, that the promissory note upon which the claimant relies is flawed in that it is unstamped and that there is no consideration to support it.

[16] She also maintains that she has a good explanation for not filing an Acknowledgment of Service, as she was never served and that she applied to the court as soon as was reasonably practicable in the circumstances of her case.

CLAIMANT'S SUBMISSIONS

[17] It is the claimant's contention that the defendant was served with the Claim Form and Particulars of Claim. He pointed to the fact that the defendant filed an Acknowledgment of Service admitting that she was served on March 23, 2011. He further pointed out that the defendant in her affidavit sworn and filed on February 13, 2018, stated that she became aware of the judgment 'sometime in 2011 or 2012'.

[18] The claimant submitted that the defendant made at least seven payments on the account after she became aware of the judgment, between 2012 and 2014. Further, that she attended court in person on June 6, 2014 and on July 15, 2014, when the application to make the provisional charging order final was heard.

[19] The claimant further submitted, that at the said July 15, 2014 hearing, the defendant admitted to owing the money to the claimant and indicated to the court, that the judgment would be settled by the end of September, 2014.

[20] The claimant underscored that at no time during the hearing on June 6, 2014 and on July 15, 2014, did the defendant assert that she was not served. He further emphasized that the defendant's conduct amounted to a waiver of the service of the Claim Form and Particulars of Claim.

[21] The Privy Council decision of **Warshaw v. Drew** [1999] UKPC 22, the local Court of Appeal Decision in **B&J Equipment Rental Limited v. Joseph Nanco** [2013] JMCA Civ 2 and the decision in **Woodward & Anor v. Phoenix Healthcare Distribution Limited** [2018] EWHC 334 were relied on by the claimant in support his contention.

[22] The claimant concluded that the defendant failed to inform either himself or the court, between February 2012 and January 2018, that she was not served, even when she was represented by counsel. As such, the claimant argued that as a result, the defendant ought to be estopped from asserting that she was not served.

THE ISSUES

[23] Based on the myriad of issues put forward by the parties it boils down to two general issues:-

1. Whether the Default Judgment against the defendant is to be set aside as of right
2. Whether the defendant has a reasonable prospect of successfully defending the claim

THE LAW

[24] My starting point will be an examination of the rules of the CPR that are relevant to the granting of an application to set aside a default judgment. Pursuant to the rules of

the CPR, there are instances where the court must set aside a default judgment and there are instances where the court may set it aside.

[25] Rule 13.2 of the Civil Procedure Rules outlines the instances where the Court must set aside a Default Judgment. It states:

> *'(1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because-*
>
> *In the case of failure to file an acknowledgment of service, any of the conditions in Rule 12.4 was not satisfied;*
>
> *In the case of judgment for failure to defend, any of the conditions in Rule 12.5 was not satisfied;*
>
> *The whole claim was satisfied before judgment was entered.'*

[26] The case at bar falls within the ambit of rule 12.4 which reads:-

> *'The registry at the request of the claimant must enter judgment against a defendant for failure to file an acknowledgment of service, if –*
>
> *(a) the claimant proves service of the claim form and particulars of claim on that defendant ;*
>
> *(b) the period for filing an acknowledgment of service under rule 9.3 has expired;*
>
> *(c) that defendant has not filed –*
>
> *(i) an acknowledgment of service; or*
>
> *(ii) a defence to the claim or any part of it;*
>
> *(d) where the only claim is for a specified sum of money apart from*

costs and interest, that defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it;

(e) that defendant has not satisfied in full the claim on which the claimant seeks judgment; and

(f) (where necessary) the claimant has permission to enter judgment'.

[27] The duty of the court under rule 13.2 is mandatory. Once there is a deviation from the rules, then a judgment entered by way of default must automatically be set aside as of right. There are several cases emanating from our jurisdiction and outside our jurisdiction, which speak to this issue. Counsel for the defendant helpfully cited several authorities for eg. **Cheseina Brooks v Davern Rumble** (2017) JMSC Civ. 34 and **Hunter vs Hunter** (2009) (unreported) Claim no. HCV02371/2007 Supreme Court Jamaica, which deal with this issue. The court has taken all the authorities cited by both sides into consideration in deciding this matter.

DISCUSSIONS

Whether the Default Judgment Should be Set Aside as of Right

[28] The answer to this question hinges on whether the defendant was served with the originating documents. If the defendant was not served, then the default judgment must be set aside as of right. The claimant in reliance on an Affidavit of Service filed on June 17, 2011, asserts that the Claim Form, the Particulars of Claim and accompanying documents were served on the defendant on March 23, 2011 and that the time for filing the Acknowledgement of Service had elapsed.

[29] The claimant on the strength of the Affidavit of Service applied to the registry for judgment in default of acknowledgement of service to be entered. The registry, as it was

entitled to do on the prima facie evidence presented, entered judgment in default of acknowledgement of service on June 17, 2011.

[30] The defendant has subsequently contended that she was not served with the documents as alleged by the claimant. The burden therefore shifts to the defendant to prove that she was not served as alleged by the claimant. In an attempt to do so, the defendant presented her passport as proof that she was not within the jurisdiction on the purported date of service, and as such, could not have been served. However, I do not accept that the passport constitutes sufficiently cogent evidence that the defendant was absent from the jurisdiction on the day in question. This decision is influenced by the fact that the defendant in the Acknowledgment of Service filed on her behalf, stated that she was served on the said 23rd March 2011. However, she has since contended that the Acknowledgment of Service filed was contrary to her instructions given to her previous attorney-at-Law.

[31] I have had the opportunity of hearing evidence in this matter on the issue of service from the process server Mr Kenton Aiken and also from the defendant herself. I also had the opportunity of assessing their demeanour and the manner in which they responded to questions put to them. I was more impressed with the demeanour of Mr Aiken than that of the defendant. I do not accept the defendant's contention that she was not served and that the filing of the Acknowledgment of Service was contrary to the instructions given to her then attorney-at-Law. The attorney-at-Law did not give evidence at trial and as such was not subjected to the scrutiny of cross- examination, to be able to confirm or deny the allegations made by the defendant. However, the defendant failed to convince me that her attorney- at -law acted outside the scope of her instructions and went on a frolic of her own, when she filed the Acknowledgment of Service.

[32] I am therefore constrained to accept the Acknowledgment of Service at face value. I find that the information contained therein were the instructions given to the attorney-at-law by the defendant, that she was in fact served on March 23, 2011. I accept that service was effected on her on that date.

[33] I am fortified in my position given the demeanour of the defendant at the hearing. I noted during the hearing that the defendant was less than firm and resolute in the manner in which she gave evidence. She was less than forthright and was vacillating at times. Her evidence was not compelling.

[34] On the other hand, the process server was adamant in his assertion that he served the defendant on the day in question. Under probing cross-examination, he did not relent and was firm and resolute in his position that he did serve the defendant with the relevant documents. I find that he was convincing and his evidence compelling. I accept the evidence of the process server that he served the defendant on March 23, 2011 with the Claim Form, Particulars of Claim and the other documents.

[35] I therefore find that the default judgment entered against the defendant ought not to be set aside as of right, as the defendant has not successfully displaced the evidence presented by the claimant, that the Claim Form and Particulars of claim were served. The claimant I find, has proved on a balance of probabilities that the defendant was served with the originating documents. However, I will examine whether the defendant has a real prospect of successfully defending the claim.

Whether the Defendant has a real prospect of successfully defending the claim

[36] P. Williams JA (Ag) (as she then was), in the Court of Appeal decision of **Frank I Lee Distributors Ltd v Mullings & Company (A Firm)** (unreported) Court of Appeal, Jamaica, [2016] JMCA Civ. 9, judgment delivered 12 February 2016 said the following: -

> *"The entering of the default judgment is regarded as a purely administrative procedure. The attitude of the courts has always been not to easily deprive a party the right to having their matter heard and thus the need for the court to have the power to set aside judgments entered without a full consideration of the merits of the claim."*

[37] Rule 13.3 of the Civil Procedure Rules deals with circumstances under which a court may set aside or vary a default judgment. It reads: -

"(1) The court may set aside or vary a judgement 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 acknowledgement 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".

[38] The court's discretion as to whether to set aside a default judgment under rule 13.3 therefore rests firmly on whether the defendant has a real prospect of successfully defending the Claim. In the leading case of **Three Rivers Council v Governor and Company of the Bank of England** District [2001] UKHL 16 Lord Hobhouse of Woodborough at paragraph 158 stated :-

'The criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality. The majority in the Court of Appeal used the phrases "no realistic possibility" and distinguished between a practical possibility and "what is fanciful or inconceivable". ([2000] 2 WLR p.91G) Although used in a slightly different context these phrases appropriately express the same idea. Part 3 of the CPR contains similar provisions in relation to the court's case management powers. These include explicit powers to strike out claims and defences on the ground, among others, that the statement of case discloses no reasonable ground for bringing or defending the claim.

Before your Lordships it was accepted by counsel that this part of the appeal should be decided under CPR Part 24 applying the criterion "no

real prospect of success". An exchange of correspondence has confirmed this. (A similar criterion is also appropriate where there is an application for leave to amend to add a new case.) Recent statements in the Court of Appeal concerning Part 24 bear repetition:-

> *"The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as [counsel] submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."*

There is no point in allowing claims to proceed which have no real prospect of success, certainly not in proceeding beyond the stage where their hopelessness has clearly become apparent'.

[39] The defendant posited that she has a real prospect of successfully defending the claim. As gleaned from the defendant's draft defence, her position is grounded in the fact that she never received a loan from the claimant in August 2009 or at all. This August 2009 loan is the subject of contention.

[40] Before I proceed further, I must say that I understand that my role is not to conduct a mini trial of the issues in the substantive claim, however, in utilizing my case management powers in dealing with matters justly and in a timely manner, I apprised myself of the evidence submitted by both parties in order to arrive at a decision.

[41] The first piece of evidence is a promissory note dated the February 7,2002 that was presented by the defendant. This piece of evidence was presented by the defendant in an attempt to establish that the only loan taken out in connection with the claimant was with his company, Spur Tree Investment Limited, and not through him in his personal capacity. This loan was in the sum of US$150,000.00 with an interest rate of 10% and a term of 90 days. However, the promissory note on which the claimant relies that was signed by the defendant and the claimant in his personal capacity on the

23rd day of August, 2009, and the sum thereon is $130,000.00 at an interest rate of 25% with a term of 12 months.

[42] The defendant in her evidence indicated that the claimant had represented to her that the 2009 promissory note was in relation to the 2002 loan with his company. She stated that the claimant further represented that the purpose of the promissory note was that he was lowering the interest rate. She further indicated that she did not read the document prior to signing.

[43] It would be difficult for a court to accept the contention made by the defendant that the 2009 promissory note was merely for a lowered interest rate, when in fact the interest rate was increased, as pointed out by the claimant. Further, there is nothing in the 2009 promissory note that speaks to the fact that it was in relation to, or part and parcel of the 2002 loan.

[44] I am also of the view that the fact that the 2009 promissory note is flawed, this is not fatal. Of importance is the fact that the defendant's signature appears on the document, and at no point did she challenge the fact that she signed the document.

[45] In order to further determine whether the defendant has a reasonable prospect of success, I have to examine whether the application was made promptly after the default judgment was brought to the attention of the defendant and whether the defendant provided a good explanation for her failure to file the Acknowledgment of Service.

[46] There is no gainsay that the application by the defendant to set aside the default judgment was not made promptly. There was a delay of between 3-4 years as the defendant in her evidence stated that she became aware of the judgment in 2011 or 2012. I find that the delay was inordinate in all the circumstances and as such, the defendant cannot be deemed to have made the application to set aside the default judgment as soon as reasonably practicable after finding out that judgment was entered.

[47] I agree with the claimant that the defendant had several opportunities to contest the fact that she was not served with the documents. I also accept the argument that the

defendant's submission to the court's jurisdiction on more than one occasion and her conduct and her actions, are indicative of a waiver of the service the Claim Form and Particulars of Claim.

[48] I adopt the principle enunciated in the Privy Council decision of **Warshaw v. Drew** [1990] UKPC 22, relied on by the claimant, as stated in the dictum of Lord Brandon of Oakbrook at page 6 as follows;

> *'It is well established that it is open to the Defendant in an action to enter an appearance in it voluntarily, even though the writ in it has not been served on him, and that by doing so he waives such service. Modern authority for this proposition is to be found in Pike v. Michael Nairn & Co. Ltd [1960] Ch 553. That was a case of proceedings begun by originating summons which was not served on the Respondent. Cross J said at page 560:-*
>
> *"The service of the process of the court is made necessary in the interests of the defendant so that orders may not be made behind his back. A defendant, therefore, has always been able to waive the necessity of service and to enter an appearance to the writ as soon as he hears that it has been issued against him, although it has not been served on him".*

[49] His Lordship went on to further indicate*:*

> *"In their Lordships' view therefore, on the assumption (contrary to the fact) that the writ in the present case was not served on the appellants, their conduct in voluntarily applying for an order dismissing the action for want of prosecution constituted a clear waiver by them of such service. The justice of this is obvious: a defendant cannot be allowed to take an active part in an action and at the same time to assert that he has never been served with the process by which the action was begun"*

[50] The claimant has presented evidence that the defendant was present during enforcement proceedings and was represented by various attorneys-at-law at various

points throughout the matter. Her overall conduct of admitting that there was a debt owing and entering into negotiations to pay the debt amount to a waiver of service. She having taken an active part in the proceedings, cannot now complain that she was never served with the originating documents.

[51] As to whether the defendant provided a good explanation for the failure to file the Acknowledgment of Service within the prescribed period, I examined the judgment of Sykes J, (as he then was) in the case of **Sasha Gaye Saunders v Michael Green** et al (unreported), Supreme Court, Jamaica, Claim No. 2005 HCV 2868 at paragraph 24 of -12, where he stated: -

> "…in the absence of some explanation for the failure to file the acknowledgement of service or the defence, the prospect of successfully setting aside a properly obtained judgment should diminish."

[52] The explanation given by the defendant for failing to file the Acknowledgment of Service was simply that she was not served with the Claim Form and Particulars of Claim. I am however of the conviction that the defendant was in fact served with the Claim Form and Particulars of Claim, hence this explanation is otiose.

CONCLUSION

[53] Based on the evidence before the court in relation to the application to set aside the default judgment, I find that the defendant was served. In any event, I do not find that the defendant has a reasonable prospect of successfully defending the claim.

The evidence as presented by the claimant is overwhelming when compared to the evidence presented by the defendant, and so the defendant's application fails.

Disposition

(1) The Notice of Application to Set Aside Default Judgment filed on January 18, 2018 is refused.

(2) Costs to be awarded to the claimant to be taxed if not agreed.

(3) Leave to Appeal is granted*.*

(4) Defendant's Attorney-at Law is to prepare file and serve orders*.*

(5) Given my decision, I make no order on the Amended Notice of Application for Court Order filed on April 4, 2018.

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Henry-McKenzie, J