



[2020] JMSC Civ 86

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016HCV03686

BETWEEN	WEBSTER McKENZIE	CLAIMANT
AND	KEVIN HAYDEN	DEFENDANT

IN CHAMBERS

Ms Yolanda A Kiffin Attorney-at-Law for the Claimant

Mr Marcus Greenwood instructed by Lettman, Greenwood & Company for the Defendant

Heard: October 14, 2019 and April 27, 2020

Application to Set Aside Default Judgment – Rule 13.3 of the Civil Procedure Rules (CPR) as amended [2006] Failure to file Defence in time – Whether inordinate to make Application to Set Aside Default Judgment – Realistic Prospect of Success

MASTER MASON

[1] Kevin Hayden the Applicant/Defendant in these proceedings seeks the following Orders by way of a Notice of Application for Court Orders filed on February 8, 2018:

1. That there be a stay of the Judgment herein pending the determination of the Applicant to set aside the judgment herein.
2. An Order Setting Aside the Default Judgment made on the 5th day of July 2017.

3. That the time for serving this application be abridged in all the circumstances.
4. That the Acknowledgment of Service filed by the Applicant on the 22nd of September 2016 be allowed to stand.
5. That the Defence filed by the Applicant on the 24th of November 2016 be allowed to stand.

[2] The grounds on which the Applicant is seeking the Orders are as follows:

1. The Applicant filed an Acknowledgment of Service within 14 days of being served with the Claim Form.
2. The Applicant's failure to file a Defence within the specified time as a result of ignorance of the Applicant and not from any wilful intention to flout the rules.
3. The Applicant has a real prospect of defending the Claim.
4. The Applicant was given the Judgment by a 3rd party on January 2, 2018 and thereafter retained counsel.
5. The Applicant is relying on his Affidavit and Defence.

Background

[3] The Claimant, a retired Supervisor of 1672 Boughbeeches Boulevard, Mississauga, Ontario L4W2B8, Canada, claims that by an agreement dated June 13, 2011, he purchased 2104.270 square meters of land part of Comfort in the parish of Manchester from the Defendant Kevin Hayden. He further claims that the Defendant at all material times represented to him that he was the freehold owner of the said unregistered land. The Claimant purports that on signing an agreement he paid Kevin Hayden the sum of \$2,300,000.00 in respect of the purchase price for which he received a receipt dated March 16, 2011.

- [4] The Claimant further alleges that sometime later the Defendant demanded the sums of \$155,000.00 and \$127,000.00 respectively to facilitate the processing of a registered title for the property in question. The Claimant received a receipt for those payments. To date, the land has not been transferred to the Claimant.
- [5] In the circumstances, the Claimant is seeking a rescission of the contract, repayment of the funds alleged to have been paid over to the Defendant, interest and costs.
- [6] On August 31, 2016 the Claimant filed a Claim Form and Particulars of Claim. The Defendant was served on September 9, 2016. The Defendant filed an Acknowledgment of Service September 22, 2016 and a Defence on November 24, 2016. The Defendant did not request an extension of time to file a Defence out of time and contends that he was not personally served with the Default Judgment on January 2, 2018, the same time he contends that the Default Judgment came to his attention.

The Law

- [7] The power of the Court to set aside a Default Judgment regularly obtained is found in Part 13 of the CPR rule 13.3 as amended in 2006. The rule states as follows:
 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 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.

- c. Where this rule gives the Court power to set aside a Judgment, the Court may instead vary it.

Is there a Defence with a Real Prospect of Success?

- [8] The primary considerations for setting aside a Default Judgment regularly obtained is whether the Defendant has a real prospect of successfully defending the claim as opposed to a fanciful prospect of success. According to Sykes J (as he then was) at paragraph 22 of his Judgment in **Sasha Gaye Saunders v Michael Green et al** Claim No. 2006HCV02868:

"The test of real prospect of successfully defending the claim is certainly higher than the test of an arguable Defence."

See the case of **ED&F Man Liquid Products v Patel & ANR** [2003] C.P. Pep 51 in which it was held:

"Real prospect does not mean some prospect. Real prospect is not blind or misguided exuberance. It is open to the Court, where available, to look at contemporaneous documents and other material to see if the prospect is real."

- [9] It is submitted that in evaluating whether the test has been satisfied, there must be exhibited to the Affidavit of Merit, a Defence which meets the requirements of Par 10 of the CPR. The draft Defence must reflect the facts on which the Defendant is seeking to rely as set out in evidence.
- [10] In the case of **Furnival v Brooke** [1883] it was said that where the Judgment is regular the Court has a discretion in the matter and the Defendant, as a rule, must show by Affidavit that they have a Defence to the actions on the merits. Stuart Sime in his text, a Practical Approach to Civil Procedure. 6th edition, p248 noted that the written evidence in support of the application to set aside will have to address, in particular, the alleged Defence on the merit, the reason for not responding to the Claim in time, and the explanation for any delay in making the application to set aside. This is in keeping with the prerequisites that must be satisfied pursuant to the rules.

- [11] Further, according to Craig Osbourn Civil Litigation Practice Guides 2005-2006, p364, 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 cause in sufficient detail to satisfy the test.
- [12] The law is clear that the Affidavit must contain the facts being relied on and that the draft Defence should be exhibited. In **Evans v Bartlam** [1937] A. C. 473, it was said that before a Judgment regularly obtained could be set aside an Affidavit of Merit was required and when the application is not so supported it ought not to be granted except for some sufficient cause shown.
- [13] It is noted that the aforementioned authorities demonstrate that there must be an Affidavit of Merit and Defence which provide the Court with sufficient evidence to persuade that there is a real prospect of a Defendant successfully defending the Claim. However, in exercising the discretion whether or not to set aside a Judgment regularly obtained the Court must also consider the matters set out in rule 13.3(2) of the CPR.
- [14] A Defendant's defence to a Claim must show that it has a real prospect of success as opposed to a fanciful one **Swain v Hillman and Another** [2001] 1 ALL ER 91.
- [15] In the instant case, the Defendant in outlining his defence denies that he owns the property in question and that he entered into an agreement for sale with the Claimant. He further contends that he has neither issued a receipt nor received cash payment for the said property, among other denials in his Defence. In rebuttal the Defendant has asserted certain factual contentions.
- [16] At paragraph 4 of his Defence he states that:

"He had entered into an agreement with the Claimant to withdraw One Million Dollars from his Scotia Bank Account which he did and gave the said sum to Mr Chantiloupe a Justice of the Peace in Royal Flat

Manchester, who passed on the money to Mr Raymond Robinson. The Claimant made an arrangement that the Defendant would withdraw his money and the Claimant would repay the Defendant."

- [17] He further contends at paragraph 8 that:

"The Claimant to his knowledge has surveyed the property and had started to prepare the land for construction, but later stopped and demanded his money from the owners."

- [18] To my mind, these allegations require findings of fact and truth through ventilation at trial. In these circumstances, there are arguable issues to be tried, and as such, I am of the view that there is a real prospect as opposed to a fanciful prospect of success in defending the claim which depends on the findings at the hearing by the trial judge.
- [19] In coming to this conclusion, I have also borne in mind the submission of Defence Counsel that this matter was previously brought before the Parish Court and the prosecution was unable to mount a *prima facie* case. I have also taken into account the fact that the receipts exhibited to the Particulars of Claim do not appear to have the signature of the Defendant.
- [20] In conclusion therefore, the parties have given two different version of the events and therefore resolution lies with the trial court. In the circumstances I am of the view that the Defendant has a real prospect of success which is dependent on the version of facts accepted by the Judge at trial.

Did the Defendant act promptly in filing his Application to Set Aside the Judgment?

- [21] In considering this head one has to ascertain whether the Defendant's application to set aside the Default Judgment was made in a timely manner. Rule 13.3 (2) (a) of the CPR as amended highlights that the Court must consider whether the Defendant has applied to the Court as soon as reasonably practicable after finding out that Judgment has been entered.

- [22] Service of the Default Judgment on the Defendant is only relevant to the extent that it helps the Court to assess the reasons for the delay and the time within which the application was made to set aside the Default Judgment.
- [23] The Process Server William Taylor in his Affidavit of Service filed on August 22, 2019 states that the Default Judgment was served on the Defendant on December 16, 2017. Although there is a discrepancy between the Claimant and the Defendant as to when the Default Judgment was served, not much turn on this. The Defendant indicates that he was not personally served on January 2, 2018. There is no requirement in the rules that he be served personally with the Judgment. The difference of about two weeks between them is insufficient for the Court to detain itself on the issue.
- [24] It is noted from the evidence that approximately one month later after being served/or became aware of the Default Judgment the Defendant retained Counsel who made the application to Set Aside the Default Judgment on February 8, 2018. To my mind the application was prompt and it could be said that he acted as it came to his knowledge.

Is there a good explanation for failing to file a Defence?

- [25] The Claim Form and Particulars of Claim were filed on August 31, 2016 and served on the Defendant on September 9, 2016. The Defendant filed an Acknowledgment of Service on September 22, 2016 within the prescribed time. It is taken into account that the Defendant acted in person (and may not have fully appreciated the need for compliance with the rules), filed his Defence on November 24, 2016, out of time by some 20 days. It would appear that he may not have been aware of the need to be in compliance with the rules where it would have been a requirement to apply for an extension of time to file his Defence out of time. Nevertheless, the Defendant, not having the benefit of a tertiary education managed to personally file his Defence, albeit late.

[26] It cannot be said on any interpretation of the facts that his delay was inordinate, despite being a Defendant in person and unrepresented. In the circumstance, I accept the reasons for the delay in filing the Defence..

Conclusion

[27] Based on the foregoing, I am of the view that there are triable issues to be considered by a Judge. There are question of facts to be determined by the Court. Consequently I make the following orders:

1. The Default Judgment entered in favour of the Claimant against the Defendant on July 5, 2017 is set aside.
2. The Defendant to file and serve an Amended Defence within 42 days pursuant to rule 10.5 of the CPR.
3. The parties are to attend Mediation on or before December 31, 2020.
4. Case Management Conference (CMC) is fixed for February 18, 2021 at 11:00a.m. for ½ hr.
5. Costs to the Claimant to be agree or taxed.
6. The Defendant's/Applicant's Attorney-at-Law to prepare, file and serve this Order.