



[2019] JMSC Civ 168

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 04420

BETWEEN	MITZIE MCKNIGHT (As Administratrix Estate Aldaine Lumsden)	CLAIMANT
AND	DERVAL RODNEY	1ST DEFENDANT
AND	BEAUMONT'S CAR RENTAL & TOURS LTD	2ND DEFENDANT

IN CHAMBERS

Mr Patrick Thompson and Ms Shanice Fletcher instructed by Patrick D Thompson and Co Attorneys-at-law for the Second Defendant/Applicant

Ms Roxanne Bailey instructed by Georgia Hamilton & Co Attorneys-at-law for the Claimant/Respondent

Mrs Kedesha Tapper-Bandoo Attorney-at-law for the First Defendant watching proceedings

Heard: July 15, 2019 and July 31, 2019

Civil Procedure - Application to set aside default judgment and for permission to file defence out of time - Civil Procedure Rule 13.2 and 13.3

MASTER T. MOTT TULLOCH-REID (AG)

[1] By amended Notice of Application to Set Aside Interlocutory Judgment in Default with Supplemental Affidavit in Support both filed on June 24, 2019, the Second Defendant has applied to the Court to set aside the default judgment which was

entered in favour of the Claimant on January 21, 2016. The Second Defendant grounds its application on the basis that the Claim Form and Particulars of Claim were not served on it and in the alternative that it has a defence with a real prospect of succeeding.

[2] If the Second Defendant succeeds in its application on the basis that the initiating documents were never served on it, I must set aside the default judgment and I need not consider the alternate position put forward (CPR 13.2). If, however, I find that the Second Defendant was served, then I am asked to exercise my discretion and set aside the default judgment on the basis that the Second Defendant has a real prospect of successfully defending the claim, has applied as soon as is reasonable practicable after finding out that the default judgment has been entered and has given a good explanation for failing to acknowledge service or file a defence, as the case may be (CPR 13.3(2) refers).

[3] The Second Defendant is a limited liability company. Service of initiating documents on limited liability companies is governed by CPR 5.7 which allows for service to be effected by way of

- “(a) telex, FAX, prepaid registered post, courier delivery or cable addressed to the registered office of the company;*
- (b) by leaving the claim form at the registered office of the company;*
- (c) by serving the claim form personally on any director, officer, receiver, receiver-manager or liquidator of the company;*
- (d) by serving the claim form personally on an officer or manager of the company at any place of business of the company which has a real connection with the claim; or*
- (e) in any other way allowed by an enactment.”*

[4] The Claimant and the Second Defendant agree that the registered office of the Second Defendant is at 56C Brentford Road, Kingston 5 in the parish of Saint Andrew. They disagree on the issue of service. Mr Thompson argues that for service to be effected on the Second Defendant, the claim form had to be

personally served on any director, officer, receiver, receiver-manager or liquidator of the company. He has emphasised personal service of the initiating documents on the officers of the company. Ms Bailey disagrees. She argues instead that service by leaving the claim form at the registered office of the company is sufficient. I agree with Ms Bailey on this point because the CPR clearly allows for this method of service on a company. There need not be personal service on an officer or director for service of a claim form on a company to be effective. Leaving the documents at the registered office is sufficient for service to be effected on a limited liability company.

[5] Mr Thompson also submits that even if the Claimant's process server left the initiating documents at the registered office of the company, her affidavit of service is insufficient. While it indicates when, where and the time at which the document was left, it does not identify the person to whom the documents were given. He relies on the case of ***Robertson v Toyojam Ltd (2008) Supreme Court, Jamaica, No 2311 of 2006*** to substantiate his point. In that case Sykes J (as he then was) made reference to the affidavit of the process server. He indicated that the process server, swore that the initiating documents were served along with the form defence and acknowledgment of service on Toyojam on August 24, 2006 between 10:00am and 11:00am. He said he handed the documents to named person, who was the manager of Toyojam and indicated the place at which the service was effected.

[6] I have reviewed the Affidavit of Service of the Claimant's process server, Mr Oswald Hamilton. Mr Hamilton has set out what he served, where he served it, the time the documents were served but he has not named the person with whom the documents were left. While that information would have been useful, the lack of it, in my opinion, is not fatal to prove effective service in circumstances where the evidence does not suggest that there was an attempt to personally serve a director, officer, receiver, receiver-manager, manager or liquidator of the company. It appears that Mr Hamilton was merely leaving the claim form at the registered office of the Second Defendant. Both parties agree that the registered office is

56C Brentford Road, Kingston 5 in the parish of Saint Andrew. Default judgment was served by registered post addressed to 56C Brentford Road, Kingston 5 in the parish of Saint Andrew and the process server's evidence is that he left the documents at 56C Brentford Road, Kingston 5 in the parish of Saint Andrew. What is the likelihood of the process server leaving the documents at a place other than 56C Brentford Road, Kingston 5 in the parish of Saint Andrew when that is exactly where he posted them? It is to be noted that Mr Hamilton not only deponed to the affidavit of service but also to the affidavit of posting so it is not likely that he would have left the documents at a place not the Second Defendant's registered office. Had Mr Hamilton indicated the name of the person with whom he had left the documents, then the Claimant would have proven beyond reasonable doubt that the documents were left at the registered office of the Second Defendant. That standard of proof need not be attained in civil proceedings. The standard of proof in civil proceedings, is on a balance of probabilities. I therefore find on a balance of probabilities that although in the affidavit of service, no specific person was named as accepting service of the documents, the documents were left at the Second Defendant's registered office and were therefore served on the company.

- [7] The Second Defendant has grounded its application in the alternative. It says that if the Court finds that it was served, then it wishes the default judgment to be set aside on the basis that it has applied as soon as reasonably practicable after finding out the default judgment was entered, it has a good explanation for not acknowledging service or filing a defence within time and it has a real prospect of successfully defending the claim (CPR 13.3 refers).
- [8] The Second Defendant was served with the Default Judgment by registered post. Paragraph 8 of the Supplemental Affidavit of Anthony Beaumont filed on June 24, 2019 says that the Default Judgment was received by the Second Defendant on August 5, 2016. The application to set aside the default judgment was made on October 24, 2016 by the Second Defendant's previous attorneys-at-law and later amended on June 24, 2019 by its current attorneys-at-law. An almost three-month

delay between the receipt of the default judgment and the application to set it aside is not unreasonable.

- [9] The Second's Defendant's explanation for not filing an Acknowledgment of Service is that it was not served. I have already indicated that I do not accept that the initiating documents were not served on the Second Defendant.
- [10] The most important hurdle which the Second Defendant must overcome if its application is to succeed is that it has a defence with a real prospect of succeeding. The Supplemental Affidavit of Anthony Beaumont filed June 24, 2019 depones that the motor vehicle in question was being driven by the First Defendant who had rented it from the Second Defendant. A draft defence has been exhibited. The defence alleges that the motor vehicle was rented and denies that the First Defendant was driving as servant and/or agent of the Second Defendant.
- [11] Ms Bailey does not believe the Second Defendant has a real prospect of successfully defending the claim. She argues that if the rental agreement between the First Defendant and Second Defendant is sufficient to rebut the presumption of agency, the document must first be admissible. She points out various reasons the document would not be admissible, including an allegation that the signature of the First Defendant is different on all the documents. Ms Bailey has submitted that a mini-trial cannot be held at this stage and relies on the case of **Swain v Hillman [2001] 1 All ER 91**. She will therefore agree with me that the issue of the signature and the admissibility of the rental agreement into evidence are to be left to the trial judge because if I were to give a ruling on that issue at this time, I would have to conduct a mini-trial. I am not a handwriting expert and would therefore have to depend on the expertise of such a person to determine whether the signatures were made by the same person. It is that determination which would help me to conclude whether the document is admissible. As I am not permitted to do that at this time, the matter has to be left to the trial judge.
- [12] The presumption of servanthood/agency can only be rebutted by the evidence of the Defendants, which is to be tested on cross-examination. Again, if I should

embark on the process at this time, I would find that I am conducting a mini-trial and taking on the role of the trial judge. It is my view that the testing of that evidence must be undertaken by the trial judge as it goes to the core of the claim and to the defence.

[13] It is my view that the Second Defendant has a real prospect of successfully defending the claim and that the issues that have been raised by the Claimant to challenge the application to set aside default judgment in circumstances where I am invited to exercise my discretion are issues which are best ventilated in a trial. I therefore order as follows:

- (a) The default judgment entered in Binder 767 Folio 31 on January 21, 2016 against the Second Defendant is set aside.
- (b) The Second Defendant is to file and serve its Defence to the Claim on or before August 16, 2019, failing which default judgment is to be entered in favour of the Claimant and the Registrar is to schedule a date on which damages are to be assessed.
- (c) The Second Defendant is to pay the Claimant costs in the application in the amount of \$30,000.00 on or before August 16, 2019.
- (d) The Claimant's attorneys-at-law are to prepare, file and serve the Formal Order.