



[2019] JMSC Civ 138

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015 HCV 04420

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

IN CHAMBERS

Mrs Kedesha Tapper-Bandoo Attorney-at-law for the First Defendant/Applicant

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

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

Mr Anthony Beaumont representative of the Second Defendant present

Heard: 15 May 2019 and 28 May 2019

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

MASTER T. MOTT TULLOCH-REID (AG.)

[1] The Applicant has applied to the Court by Notice of Application filed September 10, 2018 supported by evidence in the form of Affidavits sworn to by Affidavit of Derval Rodney and Ann-Marie Miles, which were also filed on September 10, 2018, for orders setting aside a default judgment and seeking permission to file his defence out of time.

- [2] The Claimant successfully applied for a default judgment to be entered against the First Defendant for his failure to Acknowledge Service and file a Defence to the claim. The Default Judgment is dated February 28, 2017.
- [3] On November 30, 2016, Master Mason (Ag) as she then was made an order allowing the Claimant to serve the initiating documents on the First Defendant at his last known address that being 12 Queens Avenue, Kingston 10 in the parish of Saint Andrew. The documents were duly served by post on the First Defendant as ordered by Master Mason (Ag) on January 13, 2017 and according to the process server who swore the Affidavit of Posting, the documents were not returned to the Claimant's attorneys' office.
- [4] The First Defendant and his mother, in their affidavit evidence, depone to the fact that in January 2017 the First Defendant was not living at 12 Queens Avenue, Kingston 10 in the parish of Saint Andrew as he had removed therefrom from as far back as January 2013 and his mother, had removed one year later, presumably in 2014.
- [5] They further depone to only being made aware of the claim when they received a registered slip from the current occupant and which registered slip, when claimed, brought them to the knowledge not of the Claim Form and Particulars of Claim but to the Notice of Assessment of Damages.
- [6] The inference I have drawn from the First Defendant's evidence is that he was not served with the initiating documents.
- [7] His application to set aside default judgment does not say he was not served and so the default judgment is to be set aside as of right pursuant to Part 13.2 of the CPR. Instead he grounds his application on Part 13.3 of the CPR which invites me to use my discretion and set aside the default judgment on the basis that the 1st Defendant has applied as soon as is reasonably practicable after knowing the default judgment was entered, giving a good explanation for his failure to file an

Acknowledgment of Service and Defence within time and has put forward a defence with a real prospect of succeeding.

- [8]** The submissions which counsel for the 1st Defendant has put forward on his behalf are also particularly related to CPR 13.3 where the Court is invited to exercise its discretion in setting aside the Default Judgment. CPR 13.2 is not called into play at all, although if the Claimant's evidence as to having removed from the location prior to the service by registered post being effected and the default judgment being entered, is accepted, he would not have been served with the documents and CPR 13.2 would be the relevant part of the CPR on which the application is to be grounded.
- [9]** I am however compelled to look at what is before me. The application before me is to set aside a default judgment on Part 13.3 grounds. I accept the explanation given by the First Defendant as to why he did not acknowledge service or file a defence within the requisite time. I also accept that he acted within a reasonable time in filing his application but he has not satisfied me either in his Affidavits in Support or his Draft Defence that he has a defence with a real prospect of succeeding. If the Draft Defence does not set out a defence which has a real prospect of succeeding at trial, it makes no sense for me to allow it to be filed as that would defeat the overriding objective and result in wasting of time, money and resources.
- [10]** I agree with Ms Bailey that the Defence is a mere denial. It says that the 1st Defendant swerved to avoid a collision with a motor vehicle which did not stop. The Defence, if it is to be in keeping with CPR Part 10.5 requirements must say why he swerved to avoid the collision and set out Particulars of Negligence of the unknown party. That was not done – neither in the Draft Defence nor the Affidavits in Support, which are to set out the merits of the proposed defence. I have relied on the case of *Joseph Nanco v Anthony Lugg and B&J Equipment Rental Limited* [2012] JMSC Civ 81 the judgment of Mrs McDonald Bishop J (as she then was),

which seems to have become our “go to” case when issues such as this are being considered.

- [11]** I am also aware of the case of *Evan v Bartlam* [1937] AC 473 in which Lord Atkins indicated that the Court should not deprive itself of jurisdiction to hear a case because rules of procedure were not followed. He said it was in rare cases that the requirement for an affidavit of merit should be waived but in appropriate cases that waiver would be necessary.
- [12]** In the case of *Sheneka Kennedy v New World Realtors Limited* [2017] JMSC Civ 175, the requirement for the affidavit of merit was waived because Mrs V Harris J formed the view that the failure to file the Defence in time was due to the attorney’s failings as the Defendant had done all it should have done to ensure that the matter was heard in full by a court and it was clear on the evidence that the Defendant had always had an intention to defend the claim. That is not so in the case before me and as such I am unable to set aside the default judgment on the grounds pleaded. The evidence before me is not sufficient so that I can consider any other reason to waive the requirement for an affidavit of merit to be filed. The First Defendant’s attorney-at-law has submitted that the First Defendant was transporting his best friend, the deceased, and he wishes to be given an opportunity to be heard at trial – to tell his version of the facts. If he were to be allowed to do this on the present application, he would have had to file an Affidavit which sets out the merits of his defence to which he should attach a draft defence which shows he has a real prospect of successfully defending the claim. Mrs Badoo-Tapper has urged the Court to allow the First Defendant to file his defence so he too can have his day in Court. She has relied on the case of *Victor Gayle v Jamaica Citrus Growers and Anthony McCarthy* Claim No 2008 HCV 05707 the judgment of Edwards J (Ag) as she then was which was delivered on April 4, 2011. In that case the learned judge quoted from the case of *C Braxton Moncure v Doris Delisser* (1997) 34 JLR 423 the judgment of Rattray P in which he said

“The court will not allow a default judgment to stand if there is a genuine desire of the Defendant to contest the claim supported by the existence of some material upon which that defence can be founded.”

[13] Mrs Badoo-Tapper has emphasised the fact that the First Defendant has a genuine desire to put forward his defence. I believe that the First Defendant does have that genuine desire. However, Mrs Badoo-Tapper is reminded that the reasoning of Mr Rattray P did not stop at evidence of a genuine desire. He went on to say that the Defendant who wishes to bring his own evidence at trial must provide some material upon which that defence can be founded. In my opinion the First Defendant has not done so and as such his application to set aside the default judgment must fail.

[14] It is therefore ordered as follows:

- (a) The First Defendant’s application for the Default Judgment entered in favour of the Claimant on February 28, 2017 in Judgment Binder 768 Folio 387 to be set aside, is refused.
- (b) Assessment of Damages is to take place on July 6, 2020.
- (c) The Claimant is to file and serve her Witness Statement(s) on or before June 1, 2020.
- (d) Each party is to file and serve Listing Questionnaire on or before June 22, 2020.
- (e) The First Defendant is to pay the Claimant costs in the application in the amount of \$20,000.00 on or before July 30, 2019.
- (f) The Claimant’s attorneys-at-law are to prepare, file and serve the Formal Order.