IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015HCV03926

BETWEEN	**RICHARD MERCHANT (By Next Friend Natasha Davis)**	**CLAIMANT**
AND	**ROBERT JAMES**	**DEFENDANT**

IN CHAMBERS

Miss Monique James instructed by Samuda & Johnson for the Applicant/Defendant

Miss Jamila Maitland instructed by Campbell & McDermott for the Respondent/Claimant

Heard: June 22, 2022 and February 3, 2023

Civil Procedure- Default Judgment, Application to Set Aside, Whether there is a reasonable prospect of defending the claim, delay

MASTER MISS T. DICKENS (Ag.)

INTRODUCTION

[1] In the seminal case of **Evans v Bartlam** (1937) AC 473, Lord Atkins noted that:

> "The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

[2] The above dicta encapsulates the general principles regarding the setting aside of default processes. The court retains its power to set aside any order granted in

default and this power has its expression in rule 13.3 of the Civil Procedure Rules ("the CPR"), which makes provision for the setting aside of a default judgment.

[3] This is an application by the defendant, Robert James, to set aside a judgment entered against him on May 11, 2017, on account of his default in filing an acknowledgment of service within the 14 days, stipulated by the CPR. Mr James' application to set aside default judgment was filed on June 22, 2018 and is supported by his affidavit filed June 22, 2018, as well as the affidavit of Vanessa Nesbeth filed June 27, 2018.

BACKGROUND

[4] On August 11, 2015, the claimant, Richard Merchant (who was then a minor), filed a claim through his next friend, Natasha Davis, against the defendant, to recover damages for negligence. The claim arose out of a motor vehicle accident on November 26, 2012, in which he was allegedly injured when motor vehicle licensed PB 9641, which was being driven by the defendant, collided with him.

[5] On January 26, 2017, Master Y. Brown (as she then was), extended the validity of the claim form, dispensed with personal service of the claim form and particulars of claim on the defendant and granted permission for the claim form and particulars of claim to be served on his insurers, Advantage General Insurance Company Limited ("Advantage General"), at 4-6 Trafalgar Road, Kingston 5.

[6] On February 1, 2017, the claim form and particulars of claim were served on Advantage General, in accordance with the above orders of Master Y. Brown (as she then was). An acknowledgment of service was not filed on behalf of the defendant within 14 days after service of the claim form on Advantage General. Consequently, a request for default judgment was filed by the claimant on February 23, 2017. The default judgment was subsequently entered by the Registrar on May 5, 2017.

THE APPLICATION

[7] By application to set aside default judgment filed June 22, 2018, the defendant seeks the following orders from the Court: 1). that the default judgment be set aside; 2). that he be permitted to file an acknowledgment of service and defence within fourteen (14) days; and 3). that the execution of the judgment be stayed pending the determination of this application.

[8] The defendant grounds his application on the bases that he has a reasonable prospect of successfully defending the claim, that he has applied to the court as soon as reasonably practicable after finding out that the judgment has been entered and that he was not advised by his insurers of the existence of the instant claim against him (essentially that he has a good explanation for his failure to file an acknowledgment of service).

[9] The defendant depones in his affidavit in support of the application to set aside the default judgment, that on November 26, 2012, he was the driver of motor car licensed PB 9641, which was involved in a collision with a pedestrian and he advised his insurers of the said collision immediately thereafter. The defendant further depones that on February 28, 2018, he was contacted by an investigator from Advantage General and it was at that time that he became aware that a claim was filed against him on August 11, 2015, in relation to which, the claimant secured a default judgment against him for his "failure to prosecute the claim". The defendant further depones that he was contacted by Samuda & Johnson Attorneys-at-Law, in May 2018 and was informed that they were instructed by Advantage General to protect his interest in these proceedings. The defendant denies any negligence with regard to the collision and asserts that he has a real prospect of successfully defending the claim. The defence exhibited to the affidavit of the defendant denies any negligence on his part and attributes the collision solely to the negligence of the claimant and in the alternative alleges contributory negligence on the part of the claimant.

[10] An affidavit of Vanessa Nesbeth was also filed in support of the defendant's application to set aside default judgment. Vanessa Nesbeth is the legal counsel for Advantage General. She depones that on February 1, 2017, Advantage General was served with the formal order of Master Y. Brown dated January 26, 2017, as well as the claim form and particulars of claim filed in these proceedings. She further depones that when the documents were served on Advantage General, there was an inadvertent oversight in respect of the claim due to internal restructuring of the company, resulting in the defendant not being advised of the existence of the claim at that time. This oversight was discovered on or about January 2018. She further depones that the matter was processed internally and thereafter, on May 3, 2018, the firm of Samuda & Johnson was retained to represent the defendant.

[11] An affidavit in response to the application to set aside the default judgment was filed on behalf of the claimant on May 20, 2022. The said affidavit is sworn to by Jamila Maitland and outlines that on July 9, 2013, the claimant filed a previous claim, Claim No. 2013 HCV 04016, treating with the same accident giving rise to the instant claim. In that claim, the notice of proceedings was served on Advantage General on July 10, 2013. Those claim documents were however not served on the defendant and as a consequence a new claim was filed, which is the instant claim.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[12] Counsel for the defendant submitted that the application to set aside the default judgment was made as soon as reasonably practicable after finding out that judgment has been entered. She outlined that the default judgment was never served on the defendant nor his attorneys-at-law and that the defendant only became aware of the default judgment when counsel for the defendant wrote to the claimant's counsel on May 16, 2018.

[13] Counsel for the defendant further submitted that both the affidavit of the defendant and Ms. Nesbeth provide a good explanation for the failure to file an acknowledgement of service and a defence and it is clear that the defendant's failure to file his acknowledgment of service and defence within the requisite time was not intentional or as a result of his own fault.

[14] Ms. James also submitted that the defendant has a real prospect of successfully defending the claim and relied on the authority of **Dave Blair v Hugh C. Hyman & Co. (A Firm) and Hugh C. Hyman**, (unreported) Supreme Court of Jamaica, Claim 2005 HCV 2297, delivered May 16, 2008, for the proposition that the defendant has to have a case which is better than merely arguable. Counsel submitted that the defendant has a "substantial" defence as the collision was caused by or at the very least, contributed to by the claimant.

SUBMISSIONS OF THE CLAIMANT

[15] Counsel Ms. Maitland, opposed the application to set aside the default judgment and argued that the defendant has not proven that he has a real prospect of successfully defending the claim. She noted in particular in relation to the proposed defence that, the defendant has failed to provide any evidence as to why he could not avoid the impact (collision) with the claimant.

[16] On the issue of delay, counsel argued that no good reasons have been proffered on behalf of the defendant and that in any event the delay was inordinate.

THE LAW AND ANALYSIS

[17] Rule 13. 3 of the CPR grants the court the power to set aside a default judgment. Rule 13.3 states that:

> "13.3 (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."

[18] In the case of **Flexnon Limited v Constantine Michell and Others** [2015] JMCA App 55, McDonald-Bishop JA noted at paragraph 15 that:

> "the primary test for setting aside a default judgment regularly obtained is whether the defendant has a real prospect of successfully defending the claim. The defence must be more than arguable to be such as to show a real prospect of success."

[19] At paragraph 16 of the judgment, McDonald-Bishop JA further adumbrated that:

> "Based on the provisions of the CPR and the relevant case law, the considerations for the court, before setting aside a judgment regularly obtained, should involve an assessment of the nature and quality of the defence; the period of delay between the judgment and the application made to set it aside; the reasons for the defendants' failure to comply with the provisions of the rules as to the filing of a defence or an acknowledgement of service, as the case may be, and the overriding objective which would necessitate a consideration as to any prejudice the claimant is likely to suffer if the default judgment is set aside."

[20] McDonald-Bishop JA also noted at paragraph 27 that:

> " It is clear from rule 13.3(2)(a) and (b) that it is incumbent on the court to consider whether the application to set aside was made as soon as was

> reasonably practicable after finding out that judgment had been entered and that a good explanation is given for the failure to file an acknowledgement of service and or a defence as the case may be. So the duty of a judge in considering whether to set aside a regularly obtained judgment does not automatically end at a finding that there is a defence with a real prospect of success. Issues of delay and an explanation for failure to comply with the rules of court as to time lines must be weighed in the equation.

[21] It is with these principles in mind that the court will consider this application.

WHETHER THERE IS A REAL PROSPECT OF SUCCESSFULLY DEFENDING THE CLAIM

[22] The first hurdle to clear is whether the defendant has a real prospect of successfully defending the claim. This is often times described as the "paramount consideration".

[23] In the case of **Russell Holdings Limited v L & W Enterprises Inc and ADS Global Limited** [2016] JMCA Civ. 39, Edwards JA (Ag) (as she then was), posited that:

> "[83] A defendant who has a real prospect of successfully defending the claim may still be shut out of litigation if the factors in rule 13.3(2) (a) and (b) are considered against his favour and if the likely prejudice to the respondent is so great that, in keeping with the overriding objective, the court forms the view that its discretion should not be exercised in the applicant's favour. If a judge in hearing an application to set aside a default judgment regularly obtained considers that the defence is without merit and has no real prospect of success, then that's the end of the matter. If it is considered that there is a good defence on the merits with a real prospect of success, the judge should then consider the other factors such as any explanation for not filing an acknowledgement of service or defence as the case may be, the time it took the defendant to apply to set the judgment

aside, any explanation for that delay, any possible prejudice to the claimant and the overriding objective.

[84] The prospect of success must be real and not fanciful and this means something more than a mere arguable case. The test is similar to that which is applicable to summary judgment…..

[85] In Blackstone's Civil Procedure 2004 paragraph 34.13 the learned editors in reference to summary judgment applications argued that a defendant could show that the defence had a real prospect of success by: (a) showing a substantive defence, for example volenti non fit injuria, frustration, illegality etc; (b) stating a point of law which would destroy the claimant's cause of action; (c) denying the facts which support the claimant's cause of action; and (d) setting out further facts which is a total answer to the claimant's cause of action for example an exclusion clause, agency etc."

[24] It is also settled law, that in advancing an application to set aside judgment entered in default, a defendant must provide an affidavit of merit outlining the defence, sworn to by a party who has personal knowledge of the facts concerning the defence.

[25] In the case of **Kimaley Prince v Gibson Trading & Automotive Limited (GTA)** [2016] JMSC Civ 147, McDonald J considered an application to set aside a default judgment obtained in default of acknowledgment of service and examined authorities treating with the affidavit of merit. At paragraphs 22-23, McDonald J. stated that:

[22] Having regard to the foregoing, it is apparent that the affidavit of merit ought to disclose facts which constitute the defence and in my view this obligation is not met by exhibiting a draft of the proposed defence which is a separate requirement under rule 13.4(3).

> [23] In the instant case, the defendant has failed to produce to the court evidence on affidavit that there is a prima facie defence and in particular has failed to set out the alleged defence on the merits. The effect of this is that the defendant's application to set aside the default judgment must fail. I am fortified in my view by reference to the Commonwealth Caribbean Civil Procedure, 3rd ed. at page 58, wherein the learned authors, Gilbert Kodilinye and Vanessa Kodilinye, opine –
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> It had been stated, on innumerable occasion [sic] in Commonwealth Caribbean courts under the RSC regime, that the absence of an affidavit of merit in support of an application to set aside a default judgment would normally be fatal to such application, and the practice of providing an affidavit of merit would be departed from only in rare cases. In view of the need under the CPR for the defendant to show not merely an arguable case but a real prospect of success, it seems that the affidavit of merit should be even more essential under the CPR regime. Indeed, Rule 13.4 specifically provides that an application to set aside a default judgment 'must be supported by evidence on affidavit", and the affidavit must exhibit a draft of the proposed defence. However, service of a defence alone is not sufficient, as a statement of case is not evidence'...

[26] In the instant case, the claimant who was at all material times a student at the Anchovy High School, avers that he was a pedestrian standing on the Anchovy Main Road in the parish of St James when the defendant negligently drove motor vehicle licensed PB 9641 causing it to collide into him. The claimant further avers, inter alia, that the defendant was speeding excessively in a school zone and failed to keep a proper look out.

[27] The defendant, in his affidavit in support of the application to set aside default judgment depones that the claimant who was playing with other children, suddenly and without warning ran into his path while he was lawfully proceeding along the roadway and collided into his motor vehicle. However, in the draft Defence, the

defendant avers that the claimant negligently ran into the roadway when the defendant had just started to move from a stationary position along the roadway. There seems to be some slight discrepancy in the account of the accident between the affidavit of the defendant and the draft defence, that notwithstanding, it is clear that the crux of the defendant's defence is that it is the claimant who was the sole cause of the accident or alternatively contributed to it.

[28] It is regrettable that the draft defence gives only a blanket denial to the particulars of negligence and the affidavit of merit does not seek to address any of these allegations.

[29] It bears repeating that rule 10.5 of the CPR imposes a duty on the defendant to set out in the defence all the facts which the defendant relies on to dispute the claim. Since the affidavit of merit must contain the proposed defence of the defendant, then it stands to reasons that the affidavit must equally outline all the facts upon which the defendant relies to dispute the claim along with the draft defence.

[30] The authorities reflect that it is the affidavit of merit which is critical for the purposes of establishing a reasonable prospect of successfully defending the claim and not the draft defence, though the rules require that one be exhibited to the affidavit. In spite of the observations I have made, it is key to note that the affidavit of merit expressly states that the claimant suddenly and without any warning ran into the path of the defendant's vehicle whilst he was lawfully proceeding along the roadway. These averments render the proposed defence more than just arguable and do demonstrate that the defendant has a reasonable prospect of successfully defending the claim.

[31] The question as to whether the defendant has a real prospect of successfully the claim is considered a gateway test, the defendant having cleared this hurdle, I will now go on to consider the other criteria outlined in rule 13.3(2) of the CPR.

WHETHER THE DEFENDANT APPLIED TO THE COURT AS SOON AS REASONABLY PRACTICABLE AFTER FIND OUT THAT JUDGMENT HAS BEEN ENTERED

[32] In the case of **Flexnon**, McDonald Bishop JA stated at paragraph 28 that:

> "While it is accepted that the primary consideration is whether there is a real prospect of the defence succeeding, that is not the sole consideration and neither is it determinative of the question whether a default judgment should be set aside. The relevant conditions specified in rule 13.3(2) must be considered and such weight accorded to each as a judge would deem fit in the circumstances of each case, whilst bearing in mind the need to give effect to the overriding objective."

[33] Accordingly, though I have taken the view that the defendant has a reasonable prospect of successfully defending the claim, I am still obliged to examine the other criteria outlined in rule 13.3(2) of the CPR.

[34] At paragraph 30 of **Flexnon**, McDonald-Bishop JA also went on to highlight paragraph 22 of the case of **Standard Bank v Agrinvest International** where Moore-Bick LJ considered the question of delay in respect of the introduction of the CPR. He opined that:

> "22. The Civil Procedure Rules were intended to introduce a new era in civil litigation, in which both the parties and the courts were expected to pay more attention to promoting efficiency and avoiding delay. The overriding objective expressly recognised for the first time the importance of ensuring that cases are dealt with expeditiously and fairly and it is in that context that one finds for the first time in rule 13.3(2) an explicit requirement for the court to have regard on an application of this kind to whether the application was made promptly. No other factor is specifically identified for consideration, which suggests that promptness now carries much greater weight than before. It is not a condition that must be satisfied before the court can grant

relief, because other factors may carry sufficient weight to persuade the court that relief should be granted, even though the application was not made promptly. The strength of the defence may well be one. However, promptness will always be a factor of considerable significance, as the judge recognized in paragraph 27 of his judgment, and if there has been a marked failure to make the application promptly, the court may well be justified in refusing relief, notwithstanding the possibility that the defendant might succeed at trial."

[35] I must state at the outset that there is some conflict in the position of the defendant as to when he became aware that a judgment in default was entered against him. Counsel Ms. James submitted that neither the defendant nor his attorneys-at-law were served with the default judgment and they were only made aware of it after counsel for the defendant wrote to the claimant's counsel on May 16, 2018.This however conflicts with the affidavit evidence of the defendant, which states at paragraph 5, that he became aware that the default judgment was entered against him on February 28, 2018, when he was contacted by the investigators at Advantage General.

[36] Counsel for the claimant submitted that Advantage General was served with the Notice of Assessment of Damages on November 10, 2017, but this was not placed before the court in the form of evidence.

[37] I must be guided by the evidence before the court and not just the submissions of counsel. Accordingly, it is the evidence of the defendant that he became aware of the default judgment on February 28, 2018 that will be considered for the purposes of this application. The delay in filing the application to set aside default judgment was therefore approximately four (4) months.

[38] I observe with concern that there is absolutely no evidence placed before this court to explain why it was only reasonably practicable to file the application to set aside the default judgment on June 22, 2018 and not earlier, since the

defendant was made aware from February 28, 2018, that the default judgment has been entered against him.

[39] The affidavit of Vanessa Nesbeth filed on behalf of the defendant outlines that Advantage General became aware of the claim in January 2018, though they were served with the claim form and particulars of claim from February 1, 2017. Ms Nesbeth explains that this was on account of the restructuring of the company. This in my view is an explanation as to why the acknowledgment of service and defence were not filed within the stipulated times. This evidence does not address whether the application was filed as soon as reasonably practicable after the defendant was made aware that the judgment has been entered. There is no further evidence from Ms Nesbeth nor the defendant himself to account for the period of February 28, 2018 (when the defendant became aware of the default judgment) to June 22, 2018 (when the application to set aside default judgment was filed on behalf of the defendant).

[40] Advantage General having delayed a year before bringing the claim to the attention of the defendant, it should not have taken the defendant an additional four (4) months to apply to set aside the judgment and seek the court's permission to file an acknowledgment of service and a defence. In the absence of evidence to provide an explanation for the delay between the time the defendant became aware that the judgment has been entered and when the application was made, I am constrained to find that the defendant did not apply to the court to set aside the default judgment as soon as reasonably practicable after finding out that judgment has been entered.

WHETHER THERE IS A GOOD REASON FOR FAILURE TO FILE AN ACKNOWLEDGMENT OF SERVICE OR A DEFENCE

[41] I am mindful that the defendant was not personally served with the claim form and particulars of claim and as such would not have been aware that there is a claim against him until he was so advised by his insurers upon whom the formal order

and claim documents were served. Advantage General is in the business of providing motor vehicle insurance and a part of its core business is to process accident claims of which some become litigious and are placed before the Court. The Court made an order for the claim documents to be served on Advantage General and there were no steps taken by Advantage General to have this order set aside. Advantage General was therefore obliged to bring the claim to the attention of the defendant in a timely manner and the reasons put forward for its failure to do so is wholly unsatisfactory and do not constitute a good explanation. Advantage General is however not the defendant in this claim, Robert James is. Advantage General's failure to bring the claim to his attention until February 28, 2018 therefore constitutes a good explanation for the defendant's failure to file an acknowledgment of service and a defence.

[42] I therefore find that there is a good explanation for the defendant's failure to file the acknowledgment of service or the defence.

PREJUDICE

[43] McDonald Bishop JA in the case of **Flexnon Limited** noted prejudice as a criterion to be considered in determining whether a regularly entered default judgment is to be set aside. The claimant would no doubt be prejudiced if the court is to grant the orders sought by the defendant and set aside the default judgment. I however take the view that there would be a greater prejudice to the defendant if he is to be barred from proceeding with his defence and the claim not allowed to be tried on its merits, having regard to all the circumstances of the case.

CONCLUSION

[44] In the premises, I make the following orders:

1. The defendant's application to set aside default judgment is granted.

2. The defendant is permitted to file an acknowledgment of service within seven (7) days of this order.

3. The defendant is permitted to file his defence within fourteen (14) days of this order.

4. The parties are to immediately proceed to mediation and same is to be completed by **March 31, 2023**.

5. A case management conference is scheduled for **April 12, 2023 at 12 noon for ½ hour.**

6. Any application to appoint expert witness is to be heard at the case management conference and any such application is to be filed and served by **March 3, 2023.**

7. No order as to costs.

8. The defendant's attorneys-at-law to prepare, file and serve this order.