[2021] JMSC Civ.137

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO 2017 HCV 03320

BETWEEN	**DELROY MINTO** (t/a North Coast Equipment)	**CLAIMANT**
AND	**STONE PLUS LIMITED**	**DEFENDANT**

IN CHAMBERS

Mr Aeon Stewart instructed by Stewart Law Attorneys-at-law for the Defendant/Applicant

Ms Catherine Minto instructed by Nunes Scholefield DeLeon & Co, Attorneys-at-law for the Claimant/Respondent

Heard: JUNE 30, 2021 AND JULY 16, 2021

Application to set aside default judgment CPR 13.2 and CPR 13.3

CORAM: T. MOTT TULLOCH- REID, J (AG.)

Background

[1] By Notice of Application for Court Orders with Affidavit of Kayon Campbell in Support both filed on June 18, 2021, the Defendant has applied to set aside the default judgment dated February 28, 2018 which was entered in favour of the Claimant. The Defendant also seeks a stay of the proceedings until the hearing of the application and that the enforcement proceedings be set aside. The grounds

on which the orders are being sought are that the Defendant was not served with the initiating documents or alternatively pursuant to Civil Procedure Rule 13.3.

CPR 13.2 mandatory set aside of default judgment

[2] CPR 13.2 provides that the Court must set aside the default judgment entered if the judgment was wrongly entered. A Default Judgment can be entered against a Defendant for failure to file an Acknowledgment of Service when the period for filing the Acknowledgment has passed after the Claim Form was served (see CPR 12.4).

[3] In making the request for default judgment, the Claimant filed an Affidavit of service to prove that the amended claim form and particulars of claim were served on the Defendant at its registered address located at 5 Beach Drive, Lyssons, St Thomas. The documents were served by registered post on October 26, 2017 and received a certificate of posting numbered 6966. The Defendant admits that its registered office is 5 Beach Drive, Lyssons, St Thomas. The Default Judgment was requested on February 28, 2018 and was granted on February 22, 2019. At the point in time that the Default Judgment was requested and then later granted, the deemed date of service, that being 21 days as set out in CPR 6.6, would have long passed. Based on the evidence before the Registrar as to service of documents, she would have acted well within her right to enter the default judgment.

[4] Two years later, after judgment was entered, judgment summons sought and provisional attachment orders made, the Defendant has put evidence before the Court to say that the initiating documents were not served on it. Mr Kayon Campbell, the Defendant's managing director, said that he only came to the knowledge of the claim in May 2021 when the Jamaica Social Investment Fund served a Provisional Attachment of Debt Order on the Defendant. He then sought legal assistance on behalf of the Defendant, and it was then and only then that he came to the knowledge of a claim being filed against the Defendant. Further checks of the Court's file and communication with the Claimant's attorneys-at-law,

revealed to counsel for the Defendant, Mr Shantez Stewart, that the initiating documents were purportedly served on the Defendant by registered post to its registered address. Although this may be so, the documents were not received by the Defendant. This positon is substantiated by a letter from the Headquarters of the Post and Telecommunications Department located at South Camp Road, dated June 3, 2021 (see exhibit KC 5). In that letter, Mr Michael McPherson, the Business Development Manager states that the documents were posted by registered post on October 26, 2017 to 5 Beach Drive, Lyssons St Thomas but they were never collected. The documents were therefore returned to the Central Sorting Office for them to be returned to the sender. There is no additional detail given as to whether the sender, i.e. Nunes Scholefield Deleon & Co., collected the mail back from the Central Sorting Office and if it did, when this was done. That evidence would have been helpful in determining whether the Claimant would have had knowledge that the initiating documents were received by the representatives of Nunes Scholefield DeLeon & Co before the default judgment was requested and was granted. That evidence being absent; the Court can make no speculation. The Court can go no further than the evidence that is before it.

[5] Of note is the fact that the Defendant does not deny that its address is 5 Beach Drive, Lyssons, St Thomas. There is no proof from the Claimant that this is the Defendant's address but since the issue has not been contested by the Defendant then it is safe to presume that it must be true. If the Defendant has a registered office and is doing business, it seems strange that the Defendant would not attend on the post office to collect his mail for a period of a little over a month.

[6] The Defendant relies on the case of **Loveleen Morgan-Taylor v Metropolitan Management Transport Holdings Limited** the judgment of Lawrence-Beswick J heard on October 25, November 1, and 24, 2011. In that case, the initiating documents were served by registered post. There was evidence that the letter was not collected and so it was returned to the originating post office and then collected by an agent of the sender. The learned judge found on a balance of

probabilities that the Claim Form and Particulars of Claim were not served. At paragraph 13 of the judgment, Lawrence-Beswick J said

> *Service can therefore no longer be deemed to have been effected in the face of evidence that it was not delivered* ***and was returned to the hands of the sender's representative.*** (my emphasis)*"*

The case of **Loveleen Morgan-Taylor** can be distinguished from the case at bar on the basis that the documents did not find their way back to the original sender. It is clear on the evidence that the Defendant did not receive them and so now the Court must examine why the Defendant did not receive them. Where the address is correct and the business is in operation, should the Claimant be penalised for the Defendant's unwillingness to collect its mail in a timely manner?

[7] For the answer to this question I rely on the case of **A/S Catherineholm v Norequipment Trading Limite**d [1972] 2 WLR 1242 wherein Lord Denning said at page 1247

> *Accordingly, when the plaintiff sends a copy of the writ by prepaid post to the registered office of the company and it is not returned and he has no intimation that it has not been delivered it is deemed to have been served on the company and to have been served on the day on which it would ordinarily be delivered. If no appearance is entered in due time, the plaintiff is acting quite regularly in signing judgment.*

The fact that there is nothing put before this court to indicate that the Claimant at bar knew that documents were returned and had not been delivered, would negate any allegation that the default judgment was irregular.

[8] Also of note is the case of **R v Appeal Committee of County of London Quarter Sessions ex p Rossi [1956] 1 ALL ER 670** wherein Denning LJ said at page 676

> *When service of process is allowed by registered post, without more being said on the matter, then if the letter is not returned, it is assumed to have been delivered*

in the ordinary course of post and any judgment or order by default obtained on the faith of that assumption is perfectly regular. … If however the letter is returned undelivered and nevertheless notwithstanding its return, a judgment or order by default should afterwards be obtained, it is irregular and will be set aside ex debito justitiae".

[9] The position of Lord Denning in the cases cited above was adopted by the Jamaican Court of Appeal in the case of **A.C.E. Betting Co Ltd v Horseracing Promotions Ltd and Summit Betting Co Ltd v Horseracing Promotions Ltd Civil Appeal Nos 70 and 71/1990 heard on October 22, 23, and December 17, 1990** the decision of Justices of Appeal Rowe, Forte and Downer. Mr Stewart in his submissions argues relying on the **ex parte Rossi** case that the Default Judgment was requested (February 28, 2018) after the letter was returned undelivered (November 30, 2017). The difficulty with that submission however is that the Defendant's evidence falls short in that it does not say whether the Claimant collected the package when it was returned to the Central Sorting Office and therefore had knowledge of its return when the default judgment was requested. That gap in the evidence will prove detrimental to the Defendant's application.

[10] Mr Stewart also argues that the **A.C.E Betting case** should not be relied on because it was pre CPR which emphasizes the overriding objective of the Court to do justice. He also argues that it would consider the deeming provisions as it relates to service. I do not agree with Mr Stewart. I am of the view that without a specific reference to the overriding objective in the procedural code, judges have been doing or at the very least attempting to do justice when coming to decisions. I also do not agree with him with respect to the deeming provisions, as deeming provision, although not in keeping with CPR 6.6, was considered at page 11 of the **A.C.E. Betting Case.** Mr Stewart argues that the modern approach to dealing with service by registered post is set out in the case of **Shirley Beecham v Fontana Montego Bay Ltd t/a Fontana Pharmacy [2014] JMSC Civ 119.** At paragraph 17 of that decision Anderson J held that where the defendant denies

receiving documents sent to him by registered post it is for the Claimant to dispute that evidence and the claimant would only need to put into evidence the date of delivery of same, the identity of the person who accepted same on behalf of the defendant and that information could be obtained from the post office where the document was posted. I respectfully do not agree with my brother's position. He who asserts must prove. If the defendant says he was not served, he must prove that he was not served. This is especially so in circumstances where the registered address to which the documents were sent were his own. If it is that the documents were returned, he must say that they were returned to the sender and that the sender collected them and collected them prior to making the request for the default judgment and the default judgment being entered. It is not sufficient to say they were returned to the originating post office to be returned to sender (see exhibit KC 5). Did the letter actually reach the hands of the sender? If not, then the sender could not have known that they were returned.

[11] In the case before me the letter was returned undelivered but the Defendant has not presented any evidence to suggest that the Claimant knew that the document had been returned and still pursued a request for default judgment. I can in the circumstances see no reason to disturb the default judgment on this basis and so I must now consider whether the Defendant can succeed in it application pursuant to CPR 13.3.

CPR 13.3 – the exercise of the Court's discretion

[12] Part 13.3 of the CPR allows the Court to exercise its discretion in circumstances where the Defendant has shown that he has a good explanation for failing to acknowledge service, he applied as soon as reasonably practicable after finding out the default judgment was entered against him and he has a real prospect of successfully defending the claim. Case law has emphasised the "real prospect" criterion in the past, as it has been felt that where an administrative judgment is entered, a defendant should not be denied the opportunity of having his case heard on the merits.

Real Prospect of Success

[13] The Defendant has argued that he has a defence with a real prospect of succeeding as he has no contract with the Claimant. That is the extent of the defence. The Claimant argues otherwise. Ms Minto states that this defence of saying there is no contract is bare defence. I do not agree. The Defendant is not contending that there was a contract but it is not true that he breached the terms of the contract, he is contending that there was never a contract at all between the parties. I believe that that would amount to a full defence on the issue of whether or not a contract existed between the parties.

[14] Ms Minto however goes on further to refer to the fact that the Defendant has not responded to the annexures that were attached to the Claim Form and Particulars of Claim in his affidavit in support of the application or in his draft defence. She argues that there were several order forms issued to the Defendant from the Claimant which were signed by a G Bent and that the Defendant has not denied that G Bent was its servant/agent or that the Claimant's backhoe was used during those hours. Paragraph 7 of the affidavit of Delroy Minto explains what the procedure was in terms of working on the alleged contract and being paid for that work. It is true that Defendant has failed to, in its affidavit of merit and draft defence, respond to those allegations as set out in the work orders presented and which appear to be approved by G Bent. The Defendant has also failed to address the issue as to whether Mr Bent is his servant or agent. That is a deficiency in his defence and affidavit of merit.

[15] Ms Minto relies on several cases in support of the Claimant's position. Mr Stewart submits they are of little assistance as the Defendant has not put forward a mere denial. Ms Minto refers to the case **Rasheed Wilks v Donovan Williams [2020] JMSC Civ 04600.** In that case the claimant suffered personal injuries as a result of a motor vehicle accident in which the defendant denied liability as he said the driver, who was his wife, was not his servant and/or agent. The claimant contended that the denial of servant/agency amounted to a bare denial. The Court

agreed. The reason given was because in saying that the driver was not his servant and/or agent, the defendant was obligated, pursuant to CPR 10.5, to say why he was saying that the driver was not his servant and/or agent. He had failed to do so. The **Wilks case** can be distinguished in that if the Defendant is alleging that there is no contract between the parties, then there is not much more that he can say. His evidence will be limited to that fact. If he were asked to give his version of facts as to why he says there is no contract, what could he say except, "*there was no contract because we did not enter into a contract."* In the case of **Wilks,** the defendant could have said "*the driver was not my servant and/or agent because I had given her the car and she was driving on her own mission*". It is to be remembered that in the case at bar, the Claimant alleges that there was no written contract between the parties and as such none of the explanations that were given in the case of **Barbican Height Limited v Seafood and Ting International Limited [2016] JMSC Civ 142,** (a case on which the Claimant relied) in which a written lease existed, could have been put forward.

[16] I will also say that in the case before me, the allegations on which the Claimant intend to rely are housed in one document headed *Claim Form and Particulars of Claim.* Strictly speaking the details are not particularised as it a breach of contract in respect of a specified sum of money. The allegations are not set out particularly and so the Defendant could not be obligated to respond specifically. However, the Defendant would be expected to respond to the "proof" put forward by the Claimant of the existence of a contract. The Defendant has failed to do so. The cases Ms Minto relies on have more detailed allegations pleaded so the requirement when considering CPR 10.5 would be stricter. Notwithstanding, the general rule is clear. The Defendant must put forward in his defence any allegation he intends to rely on at the trial and by virtue of his failure to speak to the annexures, his defence, together with the affidavit of merit filed in support of the notice of application has fallen short of the requirement of CPR 10.5 and CPR 13.4(2). He has therefore not proven that he has a defence with a real prospect of succeeding.

[17] Although not a bare denial, the proposed defence does not fully address all the issues that have been raised by the Claimant. CPR 10.5(1) provides that the defence must set out all the facts on which the defendant relies to dispute the claim. CPR 10.7 states that the defendant may not rely on any allegation or factual argument which is not set out in the defence, but which would have been set out there, unless the Court gives permission. Without the response to the annexures, which form a part of the Claimant's case, the Defendant has not convinced me that it has I do not see how the Defendant has a real prospect of successfully defending the claim given that he has not addressed the issues which would suggest that there indeed existed some sort of relationship between the Claimant and Defendant as alleged by the Claimant.

[18] Brooks JA (Ag) as he then was in the case of **Jamaica Beverages Limited v Janet Edwards [2010] JMCA App 11** said at page 7 of the judgment that:

> *Where the claimant has secured a judgment of the Supreme Court, a defendant in default must go further. It must demonstrate that its defence has a real prospect of success.*

I would go further to say that in a case where the final judgment has been entered and the claimant is seeking to enforce the judgment that the requirement to prove a real prospect of success is even stronger.

Good explanation

[19] I now return to the issue of the registered letter which was not collected by the Defendant even though it was sent to his registered address and the address was correct. In the **Summit Betting Case**, Rowe P in agreeing that the appeal should not be allowed, referred to the demonstration of the insincerity of the defendant in its failure to collect mail which was correctly addressed to its registered office. I will also comment on that issue here.

[20] The Defendant argues that he has a good explanation for failing to file the Acknowledgment of Service in the time stipulated by the CPR. He gives the reason for the failure as that he was never served with the initiating documents. However, no explanation has been put forward for why the Defendant failed to collect mail which was sent to his registered address. No explanation has been given as to why the registered package would have been at the post office but not collected when notice would have been given by the post office, that a package was been held there for the Defendant. I do not form the view that the Defendant's explanation is a good one. The application is now being made because the Defendant is faced with a judgment debt which was born out of obligations it tried to ignore. The actions of the directors of the Defendant are akin to a child playing hide and seek, hiding in the open space with his eyes tightly closed under the misguided belief that if I cannot see you, you cannot see me.

Applied as soon as reasonably practicable

[21] Mr Campbell states that he came to know of the case when the Jamaica Social Investment Fund served him with a Provisional Attachment of Debt Order in May 2021. He then applied to set aside the default judgment in June 2021 after lawyers for the Defendant made checks with the Supreme Court and Ms Minto. The one-month delay in making the application cannot be said to be excessive in the circumstances.

Conclusion

[22] Even if the Defendant succeeds on one point, he has failed on two important issues. It has not demonstrated that it has a real prospect of succeeding in the claim and it has not provided a good explanation for failing to file the Acknowledgment of Service in the time required by the CPR. Its application must therefore fail. I therefore order as follows:

(a) Default Judgment entered in Binder 773 Folio 13 on February 22, 2019 is not set aside.

(b) The Defendant is to pay the Claimant costs in the application in the amount of $70,000.00.

(c) The hearing of the Claimant's application for final attachment of debt filed on October 21, 2019 is adjourned and is to be heard on November 16, 2021 @ 10:00pm for one hour.

(d) The Claimant's attorneys-at-law are to file and serve the Formal Order.