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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.2002/B176

BETWEEN

RICHARD BECKFORD

CLAIMANT

A N D

QUEST SECURITY
SERVICES LIMITED

DEFENDANT

Miss Kayann Balli for Plaintiff instructed by Taylor Wright and Co.

Mr. Jalil Dabdoub for Defendant instructed by Dabdoub Dabdoub and Co.

APPLICATION TO SET ASIDE DEFAULT JUDGMENT

Heard: 13th November, 2003

Brooks, J.

The Plaintiff in this case Mr. Richard Beckford is a security guard. He entered into a contract with Quest Security Services Limited and (on his account) Quest and he participated in a relationship for some three years. He alleges that an officer of Quest defamed him and that the company improperly dismissed him in August 2000. In October 2002 he filed this action against Quest.

Quest was served with the Writ of Summons in October 2002 but did not enter an appearance to the suit. Mr. Beckford's lawyers therefore entered an interlocutory judgment in default of appearance against Quest in January 2003 and served Quest with the judgment on 7th February. The

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lawyers effected service by facsimile, as the Civil Procedure Rules 2002 were by then in place and they allowed for such service. Quest in this application has made no issue of the method of service and has not denied receiving the copy of the interlocutory judgment.

It was only after Mr. Beckford's lawyers served Quest with a notice of the hearing of the assessment of damages on or about the 3rd July 2003, that Quest had its attorneys-at-law file an acknowledgement of Service in the action. Quest's attorneys-at-law thereafter filed the present application to set aside the default judgment.

The main issue to be decided is whether Quest has, by its explanation for the delay, satisfied the requirements of Rule 13.3 (1) of the Civil Procedure Rules 2002, to allow the court to exercise the discretion given by that rule to set aside the default judgment and to give leave to Quest to defend the action.

Explanation for the Delay

Quest's reasons for the delay may be summed up as follows; all of Quest's records were kept at an office at King Street and shortly after the Writ of Summons was served there was a fire at that location. As a result there was a delay in retrieving the relevant files and information, "hence the delay in filing the defence", to use the words of Mr. Joseph Dibbs. In giving

the explanation Mr. Dibbs, the Managing Director of Quest, in his affidavit in support of the application went on to say, “after the file was located the Secretary having conduct of the matter went on maternity leave and the matter was inadvertently not followed up.”

Rule 13.3 (1)

The assessment of the application and the determination as to whether it meets the requirement of the rule 13.3 (1) must begin with a look at that rule. It says as follows:

“ 13.3 (1) Where rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant-

- (a) applies to the court as soon as reasonably practicable after finding out that judgment has been entered;
- (b) gives a good explanation for the failure to file an acknowledgement of service or a defence as the case may be; and
- (c) has a real prospect of successfully defending the claim.”

Mr. Jalil Dabdoub who appears for Quest submits that the circumstances as explained as giving rise to the default are sufficient to satisfy the requirements of the rule.

Miss Balli who appears for Mr. Beckford has strenuously opposed the application. She complains that not only was there an unexplained delay in entering an appearance but the delay in making this application was

excessive. She strongly criticized the timing of the filing of this application, which took place a mere five days before the date of the scheduled hearing of the assessment of damages.

Having reviewed the evidence and heard the submissions of learned counsel for both sides, I am satisfied that this is a matter in which the Defendant has a real prospect of successfully defending this claim. It has produced a copy of a document, which it says, governs the relationship between the parties. Mr. Beckford is said to have signed the document. Quest would stand a real prospect of success in showing that Mr. Beckford is not entitled to the relief he claims.

Although Quest has merely denied the defamation charge it is my view (without giving any expansion, so as not to prejudice the matter) that Quest would have a reasonable prospect of success in that aspect as well.

In this application however the rule requires satisfaction of all three elements mentioned therein. The question therefore is whether the Defendant has complied with **all** the requirements of rule 13.3 (1).

In the circumstances of the Defendant having only said that there was a fire at its premises where its records were kept, and that that delayed the filing of the Defence, it is my view that it has not explained the failure to file

a timely acknowledgment of service. The fire affected the place where it kept its records, not the place where it was served. This only affects the issue of a defence being filed. The Defendant has failed therefore to give a good explanation for its failure to file an acknowledgment of service, or to be more accurate, an appearance.

Does this, bearing in mind the words used in the rule viz., “the court may set aside a judgment entered under Part 12 **only if the defendant-... (b) gives a good explanation for the failure to file an acknowledgment of service ...**”, preclude the court from exercising its discretion? (Emphasis mine.) The case of *Thorn plc. vs. McDonald* [1999] CPLR 660 has been cited as authority for the proposition that the failure to give that explanation should not be somehow a “knockout blow” to the Defendant. (See *Civil Court Service* 2002 p.507.) Mr. Dabdoub has cited this principle and asks that the court apply it in favour of the Defendant.

The difficulty with that submission is that the *Thorn* case is based on the English Rule 13.3, which has a different formulation and consequently a different meaning. The relevant part of the English Rules reads as follows:

13.3-(1) In any other case, the court may set aside or vary a judgment entered under Part 12 if-

- (a) the defendant has a real prospect of successfully defending the claim; or

- (b) it appears to the court that there is some other good reason why –
 - (i) the judgment should be set aside or varied; or
 - (ii) the defendant should be allowed to defend the claim.

Rule 13.3 (2) of the UK rules then goes on to stipulate that among the things to which the court ought to have regard in considering the application, is whether the application to set aside was made promptly.

Rule 13.3 of the UK rules does not place a restriction on the court, as does our Rule 13.3.

Conclusion

It appears therefore that the defendant having failed to explain the reason for acknowledging service, that the court's discretion is not activated. In that result there is no basis for applying the Overriding Objective, as much as I think that this is a deserving case to be tried on the merits. The case of *Totty vs. Snowden* [2001] 4 All E.R. 577 is authority for the proposition that where there are express words used in the rules the court cannot give effect to the Overriding Objective.

The court is therefore obliged to refuse the application.

Costs of \$8,000.00 to the Claimant, to be paid within 14 days of the date hereof.