



[2020] JMSC Civ 71

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2017HCV03359**

<b>BETWEEN</b>	<b>EZEKIEL SAUNDERS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>PEPSI-COLA JAMAICA BOTTLING COMPANY LIMITED</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Miss Shanique Gaye instructed by Zavia Mayne & Co. for the Claimant

Miss Sidia Smith instructed by Livingston Alexander & Levy for the Defendant

Heard: September 18, 2019 and April 9, 2020

**Default Judgment – Application to Set Aside Default Judgment pursuant to Rule 13.3 of the Civil Procedure Rule (CPR) – Defendant a Limited Liability Company – issue as to whether served with the Claim Form and Particulars of Claim – No Acknowledgment of Service filed – Rules 5.7; 12.4; 30.3 of the CPR as amended 2006**

**MASTER MASON**

[1] By a Notice of Application for Court Orders filed on February 20, 2019 the Defendant seeks the following Orders:

1. That interlocutory Judgment in Default entered against the Defendant on the 11<sup>th</sup> day of February 2018 herein be set aside;
2. That the Defendant be granted an extension of time of fourteen (14) days from the date hereof to file and serve a Defence;

3. That the Claimant shall pay the Defendant's costs of this application;
4. Such further or other relief as this Honourable Court deems fit.

**[2]** The grounds on which the Defendant is seeking the orders are that:

- (a) Pursuant to rules 13.2 and 13.3 (1) of the CPR 2002 the Court has the power to set aside a Default Judgment.
- (b) The Defendant has no record of being served with the Claim Form or Particulars of Claim.
- (c) The Defendant has a Defence with a real prospect of success.

### **Background**

- [3]** The Claimant alleges that on or about August 12, 2016 he purchased a Pepsi Bubbla from Winston's Texaco Airport Service Station located at the Sangster International Airport Montego Bay, St. James, an exclusive and authorised outlet of the Defendant. He further alleges that in the process of consuming same he discovered fragments of a dark brown slimy material in his drink. As a consequence of the said incident, the Claimant alleges that he suffered personal injury, loss and incurred expenses as a result of the Defendant's negligence.
- [4]** On October 19, 2017 the Claimant filed a Claim Form and Particulars of Claim and further states that the said documents were duly served on the Defendant at its registered office at 214 Spanish Town Road, Saint Catherine.
- [5]** By Affidavit of Service sworn to by Paul Wong and filed on December 20, 2017 Mr Wong depones at paragraph 4 that he served the Defendant on November 27, 2017 at 1:30p.m. with a true copy of Claim Form, Prescribed Notes, a Form of Acknowledgment of Service, a Form of Defence and the Particulars of Claim at 214 Spanish Town Road, St. Catherine. At paragraph 5 Mr Wong depones that he made inquiries about the Defendant and was advised of its registered office at 214 Spanish Town Road, St. Catherine. Paragraph 6 of his Affidavit states that

he went to the above address and explained at the front desk that he was there to serve documents on Pepsi Cola Jamaica Bottling Limited and was advised that he was at the right location and the documents were taken from him.

[6] The central issue to be determined by the Court in this matter is whether the Defendant was served with the Claim Form and Particulars of Claim.

**Issue:** Whether the Defendant was served with the Claim Form and Particulars of Claim.

### **The Law**

[7] The essence of the Defendant's complaint in this Application is that it was not served with the Claim Form and Particulars as alleged by the Claimant resulting in its failure to file an Acknowledgment of Service. Consequently, it contends that the Default Judgment entered against it is irregular and ought to be set aside as of right.

[8] It is therefore necessary to examine the provisions of rule 12.4. The language of rule 12.4(a) is clear and refers to the obligation of a Claimant to prove service of the Claim Form and Particulars of Claim on the Defendant.

[9] Rule 12.4 states:

The registry at the request of the Claimant must enter judgment against a Defendant for failure to file an Acknowledgment of Service, if -

(a) The Claimant proves service of the Claim Form and Particulars of Claim on that Defendant;

(b) The period for filing an Acknowledgment of Service under rule 9.3 has expired:

(c) That the Defendant has not filed –

- (i) An Acknowledgment of Service; or
- (ii) A Defence to the claim or any part of it.
- (d) .....

[10] Proof of service of a Claim Form and Particulars of Claim is a condition precedent for obtaining a Default Judgment. This proposition is supported in the recent case of **Merlin John v Ainsworth Johnson** Claim No. 2012HCV02941 at paragraph 10 where Master Bertram Linton (as she then was) state:

*“Lack of service at all or lack of proper service goes to the root of any judgment obtained and in particular one obtained in default of filing an Acknowledgment of Service or the filing of a Defence.....”*

[11] Part 5 of the CPR sets out the various methods by which a Claim Form may be served. Rule 5.7 in particular set out the accepted methods of service on a limited company as follows:

- (a) By sending the Claim Form by 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.*

[12] The Defendant challenges the Claimant’s assertion that it was served with the Claim Form and Particulars of Claim and also contends that paragraph 5 of the Affidavit of Paul Wong filed on December 20, 2017 does not comply with rule 30.3(2)(b)(i) and (ii) of the CPR. The Defendant takes issue with the fact that Mr

Wong said he made inquiries about the Defendant and was advised of its registered office at 214 Spanish Town Road, St. Catherine, and that he failed to state from whom he obtained the information. Additionally, paragraph 7 of his Affidavit does not state that he knows for a fact that the Defendant's address is within his personal knowledge.

**[13]** Rule 30.3(1).....(2)(a)(b)(i)(ii)

Rule 30.3(2) reads as follows:

However an affidavit may contain statements of information and belief:

*(a) Where any of these rules so allow; and*

*(b) Where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the Affidavit indicates –*

(i) Which of the statements in it are made from the deponent's own knowledge or belief; and

(ii) The source for any matters of information and belief.

The authorities have been clear as to the need to comply with rule 30.3(2)(a)(b)(i) and (ii) of the CPR

**Analysis**

**[14]** In the case of Marcia Jarrett (Administratrix of the estate of Dale Jarrett, deceased) v South East Regional Health Authority, Robert Wan and the Attorney General Claim No. 2006HCV00816. One of the objections made by the Claimant to the Defendant's Affidavit of Merit was that the Affidavit was not a proper Affidavit of Merit because the Affidavit spoke to facts that were not within her personal knowledge and with the source and grounds not disclosed.

[15] McDonald Bishop J(ag) (as she then was) at paragraph 35 of her Judgment declared:

“On an examination of paragraph 6, I do accept that the deponent has stated what appear to be facts or information but which could not have been in her personal knowledge. If she made this statement from information and belief, she has failed to indicate the source and the grounds thereof. This is thus inadmissible as a matter of law. This observation, however, extends only to the parties that reads:

The fact that no tests were carried out would not have affected the extent, if crucial, or Mr Jarrett’s suspected cancer, thus resulting in his untimely death.”

[16] See also **Water & Sewage Authority v Waithe** [1972] 21 W.I.R 498 and **Trevor McMillan et al v Richard Khouri** SCCA No. 111/2002 delivered July 29, 2003.

[17] Non compliance of Rule 30.3 could have easily been remedied, particularly since there is no dispute that 214 Spanish Town Road, St. Catherine is indeed the registered address for the Defendant. The real issue is whether the Defendant was served in order to deal with the contentions raised by the Defendant. Justice A Thomas on June 5, 2019 made the following two (2) relevant orders:

(2) Affidavit in Response to the Application to be filed and served on or before July 5, 2019.

(4) Mr Paul Wong to attend Court for cross examination.

[18] To my mind the purpose of these orders were to secure the attendance of the Process Server for questioning which would have assisted in curing any defect in the Affidavit through oral evidence; as well as assist the Court as to the credibility of the respected positions of the parties and to assess the Affidavit in Response, all with a view to ultimately determine this disputed application.

[19] Not only is the Claimant’s position that the Defendant was served with the Claim Form and Particulars of Claim, he contends that the Defendant was served with other documents prior to the Default Judgment being entered against it. He uses

in support, the evidence contained at paragraph 4 of the Affidavit of Paul Wong which indicates:

“that on May 24, 2018 at 12:05p.m., a true copy of the Witness Statement and Notice to Tender in Evidence filed in this suit on May 21, 2018 and May 22, 2018 respectively and bearing the seal of the Supreme Court, was duly served by me on the Defendant Pepsi Cola Jamaica Bottling Limited at 214 Spanish Town Road, St. Catherine.”

**[20]** The Claimant further contends that he bears no burden of ensuring that the document are brought to the requisite department/s within the Defendant's company. This is indeed true. Further, he states that the Court must consider the credibility of the Defendant by taking into account the Affidavit of Luz Del Alba Tejada, Head of People and Business Development of the Defendant's company and filed on February 20, 2019 where she states that she became aware of the matter after being served with a Default Judgment on January 30, 2019. This they say lacks sincerity as the documents served on the Defendant on May 24, 2018 were duly stamped by Pepsi Cola and would have been before the entry of Default Judgment and therefore it would have been aware of the claim prior to being notified that a Default Judgment had been entered. This awareness, he seems to suggest, is sufficient.

**[21]** The Claimant is not on good footing. It is irrelevant whether other documents were served on the Defendant. The law is clear that the Claim Form and Particulars of Claim must be served and this must be proved by the Claimant before a Default Judgment is entered. In the circumstances of this case, the Claimant sought to do so by the Affidavit of the process server which the Registrar properly relied on to enter Default Judgment. However, the Defendant has now asserted and brought evidence to show that there is a dispute which requires resolution by the Court. The question being was the Defendant served with the Claim Form and Particulars of Claim? The fact that Ms Tejado deponed that the Defendant was not aware of the claim before the Default Judgment, might in fact be insincere, since the stamped 'documents' indicate that they would have had prior knowledge. However, it does not indicate that the

Defendant was in fact served with the Claim Form and Particulars of Claim, as these were not the documents stamped. Any insincerity on the part of this deponent, does not provide sufficient fodder for an inference to be drawn that the Defendant was in fact served with the Claim Form and Particulars of Claim.

- [22]** Ms Luz Del Alba Tejada at paragraph 4 of her Affidavit affirms that the Defendant was served with the Default Judgment and said that they contacted their attorneys-at-law Livingston Alexander and Levy as to how to proceed with the matter. That a thorough search of the office was conducted to locate the Claim Form and Particulars of Claim without success.
- [23]** At paragraph 5 of her Affidavit, Ms Luz Del Alba Tejada further sets out the procedure taken by the Company when court documents are served on them, in that the documents are forwarded to their attorneys-at-law. She further states that the person who held that post in November, 2017 is no longer employed to the company, and a search of the files she left behind does not reveal anything related to the claim. In essence, it is the Defendant's position that they were not served with the Claim Form and Particulars of Claim.
- [24]** Non Compliance with the Court's Order by Paul Wong that he attends Court to be cross-examined on the issue of service together with the Claimant not proffering a good explanation for his absence puts his credibility/veracity into question. Additionally, the Claimant did not seek to present evidence countering the allegations of the Defendant as was required by Order No. 2 of Justice A. Thomas made on June 5, 2019, that an Affidavit in Response to the Application be filed and served on or before July 5, 2019.
- [25]** The Court was unable to benefit from the cross examination of the process server vis-a-vis the assertions made by the Defendant; particularly where Mr Wong has provided no evidence such as to whom the documents were delivered and in light of the fact the Defendant is denying its receipt.

[26] The importance of service of a Claim Form and Particulars of Claim is necessary in order to proceed with a claim before the Court. This is highlighted in the following case:

**Porter v Freudenberg, Krelinger v Samuel and Rosenfield; Re Merten's Patent** [1915] 1 KB 857 where Lord Reading CJ said at page 887 "That it is a fundamental principle of English Law that a Defendant is entitled to effective notice of proceedings against him."

That principle was further enunciated in the case of **Hoddinott v Persimmon Homes (Wessex) Ltd** 2007 EWCA Civ – here Lord Dyson Declared at paragraph 54:

"That service of the Claim Form serves three purposes. The first is to notify the Defendant that the Claimant has embarked on the formal process of litigation and to inform him of the nature of the Claim. The second is to enable the Defendant to participate in the process and have some say in the way in which the Claim is prosecuted..... The third is to enable the Court to control the litigation process.

[27] It is not only a position of law, but of good common sense that a Claim against the Defendant cannot be effected unless the Defendant has been served with the Claim. It is on this basis that the cases have set out the principles embodying the importance of service of the Claim Form.

### **Conclusion**

[28] Based on the foregoing, the Court finds the Affidavit of the Defendant to be credible and concludes that the Defendant was not served with the Claim Form and Particulars of Claim. Consequently, the Default Judgment entered against the Defendant on February 11, 2018 is irregular and is set aside as of right pursuant to rule 13.2(1) (a) of the CPR which reads:

"the Court must set aside a Judgment entered under Part 12 if the Judgment was wrongly entered because –

In the case of a failure to file an Acknowledgment of Service, any of the conditions in rule 12.4 was not satisfied."

[29] Accordingly the Court makes the following orders:

1. The Default Judgment entered against the Defendant on February 11, 2018 is set aside.
2. The Claimant must file and serve a Claim Form and Particulars of Claim on the Defendant on or before May 11, 2020.
3. The Defendant to file an Acknowledgment of Service within 14 days of being served with the Claim Form and Particulars of Claim.
4. The Defendant is to file and serve its Defence within 42 days of being served with the Claim Form and Particulars of Claim.
5. Costs to the Defendant to be agree or taxed.
6. The Defendant's Attorney-at-Law to prepare file and serve this Order.