[2019] JMSC Civ 56

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013 HCV 00465

BETWEEN	**STERVIN STONE**	**CLAIMANT**
AND	**RONALD PARKER**	**1ST DEFENDANT**
AND	**TREAVIS ST. CLARE REID**	**2ND DEFENDANT**

IN CHAMBERS

Mr. Vernon Daley, Attorney-at-Law for Applicant (1st Defendant)

Mr. Richard Reitzin, Attorney-at-Law of Reitzin & Hernandez for Respondent

Heard: February 25, 2019 and March 26, 2019

Application to Set Aside Default Judgement - Service of Documents - Defence

S. BARNES, J (AG.)

[1] On March 27, 2017, the First Defendant filed an application to set aside the Default Judgement against him entered on February 19, 2013 and assessed on November 12, 2015. His application came some days after the Bailiff for St. Catherine seized his Honda motor car to satisfy the judgement debt.

[2] This claim, commenced by Claim Form with Particulars of Claim, was filed January 28, 2013 arising from an accident of November 23, 2012. The 2nd Defendant was the driver of the motor car owned by the 1st Defendant.

[3] The basis of Mr Parker's application as outlined in his Affidavit in support of the Application, is that he was not served with a Claim Form and accompanying documents on February 2, 2013 as claimed by the process server Mr Carlynton Davies, neither did he receive those served on the 2nd Defendant by Mr Hubert Jones on October 28, 2015.

[4] Under Cross Examination in this hearing by Mr Reitzin, **Mr Ronald Parker** admitted to living at Lot 217, Eltham Acres, Spanish Town, St. Catherine from February 2013 to present. His affidavits did not mention him being overseas or in another parish on the date of service of the documents.

[5] He said his mail is not delivered at home (through the postal service), except for the bills from Jamaica Public Service and National Water Commission – which he later said under Re-Examination were left in his gate/grille.

[6] The 2nd Defendant he described as his daughter's "baby father" who lived at his house "not permanently … occasionally" in 2013, 2014 and 2015.

[7] Mr. Parker is approximately 60 years old, is a tour supervisor at Island Car Rentals, has had a Driver's Licence from 1977, owned various vehicles, had them insured and has had no accidents. He said an investigator did see and speak with him after the accident as the car was insured in his name, but is adamant that he received no Claim Form or Particulars of Claim.

[8] Under Re-Examination he said his mails go to Spanish Town Post Office but he does not go there to collect them as he has no time.

[9] **Treavis St. Clare Reid,** the 2nd defendant, is 31 years old. He said he has never lived at Lot 217, Eltham Acres, "not even occasionally" and if anyone said so, that would be false. That would be so even for June 2014 and October 2015. He has

known Mr. Parker's daughter since 2009, their child was born September 2014 and it was she who would normally come to his house.

[10] He reported this accident to the police, but has not seen the Police Report and would be surprised to learn that said report blamed him for the accident.

[11] He would not be sure Mr. Parker was living at Lot 217, Eltham Acres as he only knew his daughter. He also said he's aware of the five million dollar ($5,000,000.00) judgement against Mr Parker and that the insurance company paid out some three million ($3,000,000.00).

[12] Between late 2013 and 2015 his "baby mother" was living at Mr. Parker's address – still does. He's not a member of the family, he's simply with the daughter. He too is adamant that he has never received any documents in relation to this matter.

[13] Mr Vernon Daley then Cross-Examined the process servers. First was Mr **Carlynton Davies** who said he served the First Defendant/Applicant on February 2, 2013 at his address, Lot 217, Eltham Acres, Spanish Town, St. Catherine. He identified himself, asked the man his name, he confirmed and then he handed him the documents.

[14] His exact words: 'I'm Carlynton Davies, I'm a representative of Reitzin and Associates, are you Mr Parker? He said yes and I handed him the documents." He recalled that Mr. Parker came out in shorts, and that's the same person now seated in this court.

[15] He said it was not usual to describe a person in an affidavit, but he made notes. And although it was his first encounter with the Defendant he remembers him. He said he asked him his name, he answered, he handed him the documents and left.

He has seen the defendant since then on the last court date.

[16] Under Re-Examination he said there was no gate (perimeter) at the premises and that Reitzen and Co never asked for a description of the person.

[17] **HUBERT JONES** was the other process server called. In answer to questions from Mr. Daley, he said he went to the premises (Lot 217, Eltham Acres) on 28th October 2015 between 6 and 7 a.m., NOT p.m. as stated on the affidavit. He saw and spoke to Treavis St. Clare Reid, who he did not know before. He too did not give a description of the person in his affidavit, and that evidence of said nature has never been challenged in court.

[18] Service was effected through a metal louvre window and he could not know the height of the person in those circumstances.

[19] Under Re-Examination he explained that he **did** see the error (am/pm) prior to signing the affidavit, but the Attorney instructed him to sign and that she would have the page with the typographical error corrected. This error, he says, does not affect the date, place or person served.

[20] As already stated, this matter commenced by Claim Form filed January 28, 2013. Thereafter the series of events were that:

1. Carlynton Davies personally served the documents on the first defendant on February 2, 2013 at Lot 217, Eltham Acres.
2. On February 19, 2013 an application for default judgement was filed, there being no acknowledgement of service or defence filed by the Defendant.
3. On June 26, 2014 and November 24, 2014, Mellecia Brooks mailed by regular pre-paid post several documents in this matter to the Defendant's address at Lot 217, Eltham Acres, Spanish Town, St. Catherine.
4. On October 28, 2015 Hubert Jones, Bailiff, personally served on the 2nd defendant several documents pertaining to the Assessment of Damages.
5. Damages were assessed on November 12, 2015 by The Honourable Mr. Justice Chester Stamp as follows
    (a) Special Damages assessed at $1,230,579.21 inclusive of $1,100,000.00 for loss of earnings with interest at 3% per annum from 23rd November 2012 to 12th November 2015.

(b) General Damages assessed at $3,800,000.00 with interest at 3% per annum from 2nd February 2013 to 12th November 2015.

(c) Costs to the Claimant to be taxed if not agreed.

6. On December 23, 2015 the defendant's insurers, Advantage General, paid out $2,999,790.00 in partial satisfaction of the court's ruling.
7. An Order for Seizure and Sale of Goods was filed December 13, 2016.

[21] The application to set aside the Default Judgement came some days after the Bailiff for St. Catherine seized Mr. Parker's Honda motor car to satisfy the judgement debt.

[22] The first hurdle, is that of service of the documents upon the 1st and 2nd Defendants at Lot 217 Eltham Acres. On this, the issue is one of credibility. Having heard from the affiants, the court does not accept Mr. Parker's affidavit or oral evidence that he was not served. It is the evidence of Mr Davies which is accepted as credible by this court – that he went to the home where he saw and served Mr. Parker, who was in shorts. That detail, further adding to the credibility of the witness.

[23] Mr. Reid – the 2nd Defendant and "son-in-law" – deliberately lied to the court when he said he has never lived, "not even occasionally" at Lot 217 Eltham Acres. This is directly opposite to what Mr. Parker said that he "occasionally" stays there. In fact, Mr. Reid said any such statement (occasional staying) would be false.

[24] His demeanour inspired no confidence, and it is outrightly false for him to declare, under oath, that his "baby mother" and child lives at the Parker residence, but he does not; neither has he ever stayed there when the "father-in-law" is saying the opposite. This court accepts that he lives there, at least occasionally, and was indeed served by Mr. Jones, through the window, as he said he did.

[25] Court documents, subsequent to the service of Claim form et al, were served by post. Mr. Parker says there is no door-to-door mail delivery in his community and he has never gone to the Post Office to get his mail. Well, there is nothing to

suggest that the stated address was incorrect or that any such mail was returned undelivered – even from a rural post office. It stands to reason, therefore, that having been mailed to the given and proper address, and 21 days have passed, the requirement of Rule 6.6(1) has been fulfilled for service.

[26] The authority raised by Mr. Reitzen of Watson v Sewell [2013] JMCA Civ 10 is instructive. Justice Panton stated at paragraph 41…

> *"If a mere denial was enough would it not be very easy for every defendant, who had failed to respond to due process in the time allotted, especially when the validity of the claim form had expired, and the limitation period had passed, to deny receipt of the claim form? There was no evidence from the postal service to suggest, or in support of, any inadvertent or negligent foul-up in the department of registered postal services, to explain the non-delivery of the claim form; the claimant had done all that was required of him under the rules, and the claim form and accompanying documents had not been returned unclaimed. It seems to me that the evidence submitted may not have crossed the threshold necessary to rebut the deemed service date presumed in the CPR, and I would find that the default judgment against the 2nd respondent was regularly entered….." [Emphasis added].*

[27] In this case it was 'subsequent' documents which were mailed by 'regular' post and therefore complied with the CPR as noted above.

[28] This court also finds it 'strange' that Mr Parker did not follow-up with his insurance company after he made a report of the accident, as to the outcome of its investigation and any claim which could have been made against his policy.

[29] There is also the issue of the error in the time Mr. Jones served the documents (am/pm). He told this court that he saw the error even before affixing his signature, but was assured that a correction would have been made. Clearly it was not. Even there Mr Jones displays his honesty. The court accepts him as truthful and further accepts that his explanation is one which is reasonable in the circumstances and acceptable to the court.

[30] To my certain knowledge, I have never seen description of persons upon whom documents are served in the affidavits of the process server. For the Applicant's

Attorney even to suggest that this was necessary or even the norm, goes against the grain of the usual and accepted practice.

[31] But having found that service was indeed effected, that finding, on its own, is not sufficient to set aside the default judgement regularly obtained. It is Rule 13 of the CPR and the authorities which must guide that decision. Under Rule 13.3 the judgment should be set aside if the "defendant has a real prospect of successfully defending the claim".

[32] Note is taken of the authority raised by Mr Daley for the Applicants – ***Swain v Hillman*** [2001] 1All ER 91 which sets out that the primary test for setting aside a default judgement regularly obtained is that the defendant must have a real prospect of defending the claim rather than a fanciful one.

[33] I also stand guided by Justice Sykes's (as he was then) Judgement in Saunders v Green & Others Claim No 2005 HCV 2868, (heard February 2007), and direct you to paragraph 22 which succinctly defines the term used in Rule 13.3:

> *22. "In the new rule 13.3 the sole question is whether there is a real prospect of successfully defending the claim. This test of real prospect of successfully defending the claim is certainly higher than the test of an arguable defence (see ED&F Man Liquid Products v Patel & ANR [2003] C.P. Rep 51). Real prospect does not mean some prospect. Real prospect is not blind or misguided exuberance. It is open to the court, where available, to look at contemporaneous documents and other material to see if the prospect is real. The court pointed out that while a mini-trial was not to be conducted that did not mean that a defendant was free to make any assertion and the judge must accept it. This, in my view, is good sense and good logic…."*

[34] Part 10.2 of the CPR states how the defence ought to be done.

(1) A defendant who wishes to defend all or part of a claim must file a defence (which may be in form 5).

(2) However where

(a) a claim is commenced by a fixed date claim in form 2 and there is served with that claim form an affidavit instead of a particulars of claim; or

(b) where any rule requires the service of an affidavit, the defendant may file an affidavit in answer instead of a defence.

[35] In this case, the matter having been commenced by Claim Form with Particulars of Claim, the defence ought to be set out in Form 5. Mr. Parker's draft defence is appended to his application to set aside (page 68 of Index to Judge's bundle) filed on March 27, 2017, and conforms to the rule in form. However, he's not an eye-witness and was not present at the time of the accident. What is stated by him at para 7, which outlines the accident, is predicated on hearsay. See Nanco v Lugg & B&J Equipment Rental Ltd [2012] JMSC Civil 81, judgement of Justice Marva McDonald-Bishop, (paras 67-73). Note particularly:

[68] …….I have particularly observed that Miss Bennett has set out no facts in her affidavit whether in her personal knowledge or from information and belief with source indicated that could be evidence of the defence being relied on…….

69] However, Miss Bennett does not indicate being an eye witness to the incident and there is nothing to suggest that she was present at the time. It means whatever is to be stated by her, on behalf of the 2nd defendant, by way of defence, would be hearsay. There is nothing to indicate what facts she would be able to prove from her own knowledge and what facts are based on hearsay. There is, in essence, no, prima facie, admissible evidence of a defence revealed on the affidavit evidence filed in support of the application. The rule in 13.4 is clear that the application to set aside must be supported by affidavit evidence and the draft defence must be exhibited. The draft defence must reflect the facts on which the defendant is seeking to rely as set out in evidence. In this case, none of the facts constituting the defence has been stated on oath as required. The affidavit is certainly not one of merit.

[36] That decision was upheld by Justice Morrison in the Court of Appeal (***B & J Equipment Rental Ltd v Joseph Nanco*** [2013] JMCA Civ 2).

[37] The affidavit of Mr Treavis St. Clare Reid in support of Mr Parker's application, is just that – an affidavit. Even if he has made a statement tantamount to a defence therein, it is not in conformity with the rule and cannot be accepted.

[38] So, there being no defence, the court is constrained to make the following orders:

1. Notice of Application to set aside Default Judgement filed March 27, 2017 is refused.

2. Cost to the Respondent/Claimant to be agreed or taxed.

3. Respondent/Claimant's Attorney-at-law to prepare, file and serve these orders.

…….
Sheron Barnes (Ms)
Puisne Judge (Ag.)