[2020] JMSC Civ 89

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2016HCV00244

BETWEEN	**TANK-WELD METALS LIMITED**	**CLAIMANT**
AND	**SEAL CONSTRUCTION COMPANY LIMITED**	**1ST DEFENDANT**
AND	**CHESCOT BROWNIE**	**2ND DEFENDANT**
AND	**ROBERT THOMAS**	**3RD DEFENDANT**

IN CHAMBERS

Mr. Maurice Long instructed by Clough Long & Co for the Claimant/Respondent.

Mr. Keith Bishop and Andrew Graham instructed by Bishop & Partners for the Defendants/Applicants.

Heard November 26, 2019, January 28, February 21 and May 11, 2020.

Civil procedure – Application to set aside judgment in default – Whether there is an affidavit of merit – Whether the defendants have demonstrated that they have a real prospect of successfully defending the claim – Rules 5.7, 13.2 and 13.3 of the Civil Procedure Rules, 2002, as amended.

N. HART-HINES, J (Ag.)

[1] On May 11, 2020 I indicated my decision in relation to applications before the court and promised to put my reasons in writing. I now do so.

BACKGROUND

[2] The claim arises from a contract for the sale of goods on credit. The contract is one between the claimant and a company with which the 2nd and 3rd defendants are affiliated. The 2nd and 3rd defendants are directors of two separate legal entities. They are as directors of the 1st defendant company, Seals Construction Company Limited, and they are also directors of Seal Investments Company Limited. The claimant states that the contract was with 1st defendant while the defendants allege that the contract was with Seal Investments Company Limited. The identity of the proper company to be named as defendant is in issue. This issue seems to have arisen because the document at the heart of this case states that the party to whom credit facilities were granted was "*Seal Investments Company Limited trading as Seals Construction Company Limited*". Invoices in respect of goods delivered were issued in the name of Seals Construction Company Limited, and the suit has been filed against that company as 1st defendant.

[3] The amended claim form indicates that the claimant is suing the defendants for $13,696,790.86 for goods sold and delivered by the claimant to the 1st defendant, together with interest. The amended particulars of claim indicates that on August 11, 2011, the claimant granted credit facilities to the 1st defendant for the supply of hardware items to the 1st defendant and that between the November 22, 2012, and February 22, 2013, items were supplied totalling $7,748,745.01 pursuant to the said agreement. It is also alleged that on August 11, 2011, the 2nd and 3rd defendants guaranteed payments in respect of the goods supplied but failed to make said payments within thirty days of the date of the invoices. It is further alleged that it was a term of the credit facility agreement and guarantee, that the defendants would be liable to interest being charged at the overdraft rate of the Bank of Nova Scotia Jamaica Limited plus five percent (5%) or twenty-five percent (25%) whichever was greater from the due date of payment. The defendants were therefore charged interest at the rate of twenty-five (25%) per annum on an accumulated basis, representing approximately $5,934,045.85.

THE APPLICATION

[4] A judgment in default was entered against the defendants with effect from July 1, 2016 in Binder 772 Fol 210 after they failed to file an acknowledgement of service and a defence within the requisite periods after service of the claim form on them.

[5] On October 16, 2019, this matter was listed for hearing of a judgment summons. On that date counsel for the defendants attended the hearing and sought an adjournment on the basis that the defendants had not been served with the claim form and the requisite accompanying documents and that counsel had been instructed and intended to file an application to set aside the default judgment pursuant to rule 13.2 of the Civil Procedure Rules (hereinafter "the CPR"). The hearing was adjourned to November 26, 2019.

[6] The notice of application filed on October 22, 2019 referred only to rule 13.3 of the CPR, that is, that the default judgment be set aside on the basis that the defendants have a good defence with a real prospect of success and made the application as soon as reasonably practicable after discovering that the judgment in default was entered.

[7] The application is supported by an affidavit filed on October 22, 2019 by counsel Mr. Andrew Graham, indicating that the 2nd and 3rd defendants were not served with the claim form pursuant to rule 5.3 of the CPR, as alleged by the claimant's process server, and consequently the 1st defendant was not served. Mr. Graham further averred that the 1st defendant company was the wrong company before the court and thus the 2nd and 3rd defendants, as directors of that company, also have a good defence with a reasonable prospect of success.

[8] On November 26, 2019 an oral application was made to amend the application filed on October 22, 2019 so that it referred to the fact that the application was made pursuant to both rule 13.2 and rule 13.3 of the CPR. The oral application was granted and the court heard from the process server who was present at court on that date.

[9] On November 26, 2019, January 28, 2020 and on February 21, 2020, the court heard evidence from Mr. Daniel Robinson, Assistant Bailiff at the St. James Parish Court, and the 2nd and 3rd defendants regarding the issue of service of the claim form. The court permitted some questions to be asked of the 2nd and 3rd defendants in relation to the defence outlined. However, in considering the issues of the case while hearing the application, the court was mindful not to conduct a mini trial. Counsel representing the parties were directed to file written submissions by March 20, 2020, and an extension was granted to April 14, 2020.

THE ISSUES

[10] I have identified the following issues to be determined in this application:

1. Whether service was effected and where.
2. Whether CPR rule 5.7 was complied with.
3. Whether there is an affidavit of merit filed.
4. Whether the defendants applied to the Court as soon as was reasonably practicable after discovering that the default judgment was entered.
5. Whether the defendants have demonstrated that they have a good defence with a real prospect of success.
6. Whether the court should give consideration to an amendment of the claim in the absence of an application.

THE SUBMISSIONS

[11] In summary, counsel for the claimant Mr. Long submitted that the Assistant Bailiff, Mr. Robinson, was credible and that service of the defendants had been proved and the defendants have failed to give a good explanation for the failure to file an acknowledgement of service and a defence. Further it is submitted that there is no affidavit of merit in support of the application, and that the defendants did not apply to have the default judgment set aside soon as was reasonably practicable to do so after finding out that judgment had been entered. Finally, counsel submitted that the defendants do not have a good defence with a real prospect of success.

[12] In summary, counsel for the defendants Mr. Bishop and Mr. Graham submitted that the Assistant Bailiff had been discredited. Further, counsel submitted that the defendants have established that they have a good defence with a real prospect of success as the wring company was named in the pleadings. Further, it is submitted that the guarantee is unenforceable against the 2nd and 3rd defendants.

ANALYSIS

[13] The 2nd and 3rd defendants challenge that they were ever served at all. In addition, it is contended by these defendants that the registered office address for the 1st defendant is not 5 Bevin Avenue, but rather 19 Gloucestershire Avenue.

[14] I have heard and evaluated the oral evidence of Daniel Robinson, Robert Thomas and Chescott Brownie. Mr. Robinson stated that he served both men with the amended claim form on March 6, 2017. Prior to that date he had served the claim form, and he also subsequently served the judgment summons on the 2nd and 3rd defendants. I now indicate my findings on the issue of service.

Credibility

[15] Mr. Robinson said that on March 6, 2017 he went to 5 Bevan Avenue in respect of another matter but took the claim form and accompanying documents with him and served them. He said the 2nd defendant was known to him personally for approximately five (5) years and had seen Mr. Thomas previously.

[16] I have noted that initially (on November 26, 2019) Mr. Robinson gave evidence about service at “Bevin” Avenue. Subsequently (on January 28, 2020) reference was made to 5 “Bevan” Avenue. I have also noted that the affidavit of service filed on August 2, 2017 reference was made to 5 “Bevan” Avenue. However, I have noted that both Mr. Robinson and Mr. Thomas have stated that “Bevin” Ave can be found off Howard Cooke Boulevard in Montego Bay, St. James. I believe that I can take judicial notice of this fact. If I am

mistaken and cannot take judicial notice of this, I believe that I can infer from the evidence of both men, that the correct name of the place at which the defendants were served is Bevin Avenue and not Bevan Avenue.

[17] I find Mr. Robinson to be forthright and credible when he said that he knew Mr. Brownie well and had visited him on more than one occasion at that location. I find Mr. Robinson to be credible when he said that he served the 2nd and 3rd defendants with the amended claim form and accompanying documents at 5 Bevin Avenue on March 6, 2017. I do not find that Mr. Robinson has been discredited in any way and I have found no reason or motive for him to fabricate a story that he effected service on the defendants. He has said that he has been to Bevin Ave previously to see the 2nd defendant and attend meetings. It was never suggested that there was any malice or ill-will on his part towards the 2nd defendant. I do not find that he is mistaken as regards service or that he has lied in any way.

[18] I have also considered the affidavit evidence[1] of the Bailiff Mr. Robinson in relation to the earlier service of the claim form on March 31, 2016. No direct challenge was made to this service as throughout the hearing of the application, the focus of both parties has been on the service said to have been effected on March 5, 2017. Based on the affidavit filed on July 1 2016, I am satisfied that the original claim form was served on March 31, 2016.

Service on a limited company

[19] According to CPR rule 5.7, service on limited company may be effected

> *"…(b) by leaving the claim form at the registered office of the company; or*
> *(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…."*

[20] It is the evidence of both Mr. Thomas and Mr. Brownie that both are directors of the 1st defendant company, but that its registered office is at

[1] Affidavit of service filed on July 1, 2016.

Gloucestershire Avenue. Neither witness, nor Mr. Robinson have produced any document for the court's consideration to prove the registered office of the 1st defendant. However, this is actually not necessary since CPR rule 5.7 deems the 1st defendant to have been served provided that a company director is served, or alternatively, a manager of the company is served at a place of business of the company which has a real connection with the claim. Irrespective of whether or not 5 Bevin Avenue is a place of business of the company which has a real connection with the claim, the company directors were served there and CPR rule 5.7(b) does not stipulate the need for a service at a particular place.

[21] I am therefore satisfied that the 1st defendant was served as result of service on the 2nd and 3rd defendants as alleged by Mr. Robinson. CPR rule 5.7 has been complied with.

[22] The application pursuant to CPR rule 13.2 therefore fails.

Should the default judgment be set aside under rule 13.3?

[23] The court may set aside a default judgment if a defendant has a real prospect of successfully defending the claim. **Rule 13.3** of the CPR provides:

> *"**13.3(1)** The Court may set aside or vary a judgment 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 acknowledgment 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."*

[24] Following the 2006 amendment to the Jamaican CPR, the Court of Appeal of Jamaica has emphasised that the primary consideration in determining whether to set aside the default judgment, is whether the defendant has a good defence in fact or in law, or both with a realistic prospect of success. Recently in ***Denry Cummings v Heart Institute of the Caribbean Limited*** [2017] JMCA Civ 34 where at paragraph 66 McDonald-Bishop JA reiterated

that the "*foremost consideration*" is the defendant's prospects of success.

[25] In ***Swain v Hillman*** [2001] 1 All ER 91 at 92, Lord Woolf MR said "*the words '… real prospect of succeeding' ... direct the court to the need to see whether there is a "realistic" to as opposed to a fanciful prospect of success*". It must be more than a merely arguable case

Is there an affidavit of merit?

[26] It is settled law that in order to set aside a default judgment, there must be a defence on the merits. CPR rule 13.4(2) and (3) indicate that the application must be supported by evidence on affidavit and that the affidavit must exhibit the proposed defence.

[27] The courts that developed judge-made rules that there should be an affidavit of merit which should demonstrate a "prima facie" defence (see ***Evans v Bartlam*** [1937] A.C. 473 per Lord Atkin said at 480). The affidavit must be sworn to by someone who can swear to the facts which the defendant intends to rely on, based on personal knowledge or information and belief. A draft defence must be exhibited to the affidavit.

[28] When an application is not supported by an affidavit of merit, it ought not to be granted except for some sufficient cause being shown. The affidavit of merit can be waived but there must be justification for the exercise of the court's discretion in doing so. Such discretion must be exercised sparingly and only in exceptional circumstances. I am asked to consider whether the affidavit filed in support of the application is an affidavit of merit.

[29] In ***Marcia Jarrett (Administratrix of estate of Dale Jarrett, deceased) v South East Regional Health Authority, Robert Wan and The Attorney General***, Claim No 2006HCV00816 (unreported) Supreme Court, Jamaica, judgment delivered November 3, 2006, McDonald-Bishop J (ag) (as she then was) considered similar arguments as those raised by Mr. Long in this matter. The learned judge reviewed the affidavit of counsel Ms. Lindsay and ruled that

the relevant part of the affidavit consisted of facts within counsel's knowledge and those parts of the affidavit which comprised hearsay statements, set out the source of the information. The learned judge ruled that the affidavit was an affidavit of merit.

[30] Although it perhaps would have been more appropriate for the 2nd and 3rd defendants to swear to the affidavit in support of the application, rather than for counsel Mr. Graham to do so, I am satisfied that the affidavit contained sufficient detail to be accepted as an affidavit of merit.

[31] At paragraphs 8, 10 and 11 of his affidavit, Mr. Graham stated that based on statements made to him by the 2nd and 3rd defendants, he believed that the 1st defendant was wrongly before the court and the 2nd and 3rd defendants had not been served. Counsel averred that it was Seals Investment Company Limited which entered into an agreement for a credit facility and which benefited from the credit facility. The affidavit exhibited the Credit Application Form which referred to one company trading as another. The affidavit also exhibited to a copy of the proposed defence which stated that the incorrect company had been sued as that there was no contract with between the claimant and Seal Construction Company Limited. I am satisfied that the substance of the defence is contained in counsel's affidavit, and that the affidavit sets out the source of the information averred. The source of the information is in part, the 2nd and 3rd defendants, as well as the Credit Application Form, upon which the claimant relies.

[32] The matters referred to in the defence have been repeated by 2nd and 3rd defendants when they gave viva voce evidence and said that the 1st defendant is not a proper party to the suit as it did not have a contractual relationship with the claimant. This is a triable issue.

Have defendants applied to the Court as soon as was reasonably practicable?

[33] The explanation that the defendants were not served is not accepted. I must now consider whether the defendants applied to the Court as soon as was reasonably practicable after discovering that the judgment in default was

entered. By my calculation, there was a delay on the part of the defendants of 41 days from they received notification of the default judgment. I do not find that the delay of 41 days is inordinately long.

[34] The overriding objective of the CPR requires that matters are dealt with fairly and determined on their merits, rather than shutting litigants out on account of procedural errors. The court must dispense justice by resolving issues between the parties in a manner which saves time and expense. In ***Villa Mora Cottages Limited and Monica Cummings v Adele Shtern***, SCCA No. 49/2006, (unreported) Court of Appeal, Jamaica, judgment delivered on December 14, 2007, at page 10 Harris JA said:

> *"It cannot be disputed that orders and rules of the Court must be obeyed. A party's non-compliance with a rule or an order of the Court may preclude him from continuing litigation.* ***This, however, must be balanced against the principle that a litigant is entitled to have his case heard on the merits****. As a consequence, a litigant ought not to be deprived of the right to pursue his case."* (Emphasis mine)

[35] Instead of shutting out a litigant, it may be appropriate to order costs to the claimant, having regard to the defendant's delay in responding to the claim.

Is there any likely prejudice to the claimant?

[36] The claimant has not alleged that prejudice has been caused. However, I am mindful that delay in the progression of the matter may cause prejudice to a claimant because with the passage of time, memories fade, or it might be difficult to locate witnesses, or a witness might have died. Nonetheless, I am guided by dictum in ***Philip Hamilton (Executor in the Estate of Arthur Roy Hutchinson, Deceased, testate) v Fredrick Flemmings & Gertrude Flemmings*** [2010] JMCA Civ 19, where Phillips JA said at paragraph 41 that a litigant ought not to be denied access to justice on account of a procedural default, "*even if unjustifiable, and particularly where no prejudice has been deponed to or claimed*".

Is there a defence with a real prospect of success?

[37] It seems to me that the issue of whether or not the 1st defendant is the proper

party before the court is not one for me to determine, but rather for a trial judge. This court is not to engage in a mini-trial when hearing this application.

[38] Further the creation of and the effect of the various documents showed to the defendants during cross-examination (such as the Credit Application form and purchase orders) could not be considered as either pages were missing or the signature of the 2nd and 3rd defendants as directors were not clear on the documents. I could not deduce how the documents came to be created and the authors thereto. It is not clear for example how the words "Seal Investment Co Ltd t/a [trading as] Seal Construction Co Ltd" came to be on the Credit Application Form or how the purchase orders came to be made out to Seal Construction Company Limited.

[39] What I can say however is that, even as ambiguous as the Credit Application Form appears, it is patently clear that there could not be a company trading as another company. I accept Mr. Graham's submission on this point that the Registration of Business Name Act defines "trader" as "every individual or firm carrying on business by way of trade in Jamaica". It does not include a "company" and it would not be permissible for one company to trade as another company. In the circumstances, there are triable issues and questions of fact to be determined by a trial judge, as regards whether Seal Construction Company Limited is the proper defendant.

[40] I believe that there is a triable issue in relation to precisely which company owes the sums to the claimant. There may also be an issue in relation to the nature of the contract, the interest rate charged in respect of that contract, and whether an exemption under the Money Lending Act was required and obtained. Mr. Graham submitted that the interest rate charged by the claimant is in breach of the Money Lending Act. In reply, counsel Mr. Long, in his submissions, has referred to the Money Lending (Prescribed Rates of Interest Order 1997) and stated that the rate of 25% was prescribed and lawful. I will not give further consideration to, or make any pronouncement on this issue as these are issues for determination at a trial.

[41] I find that the 2nd and 3rd defendants have shown they have a defence on the merits with a real prospect of success, insofar as the identity of the company which owes the debt is concerned. Even though the 2nd and 3rd defendants have accepted that they are the directors of both companies, it is not possible to attribute liability to them in respect of a claim against the 1st defendant, when it cannot be clearly and unequivocally established on the contractual documents that the 1st defendant is liable to the claimant. The 2nd and 3rd defendants were joined in the suit on the basis that the debt was owed by the 1st defendant and that they were guarantors for that debt. If the default judgment is set aside against the 1st defendant, it must also be set aside against the 2nd and 3rd defendants.

No application to amend pursuant to CPR rule 19.4

[42] The decision to set aside the default judgment might have been obviated by an application to add a party or amend the claim form to substitute the name of Seal Investment Company Limited instead of the name of the 1st defendant, Seal Construction Company Limited, pursuant to rule 19.4 of the CPR. However, there was no application before me for an amendment of the claim form to reflect the name of the correct company as defendant.

[43] When the Court enquired of counsel's intention to amend pursuant to CPR rule 19.4, Mr. Long indicated that no such application was filed because the invoices were issued in the name of the 1st defendant company. It is therefore the claimant's position that Seal Construction Company Limited is the proper defendant. In contrast, the 2nd and 3rd defendants have indicated that the company with which the claimant had an arrangement for the supply of goods was Seal Investment Company Limited instead of the 1st defendant Seal Construction Company Limited.

[44] This court would not make any order pursuant to rule 19.4 of the CPR without an application being filed and without submissions being heard from the parties on the point. However, it is open to the claimant to file such an application at a later time, should it deem it necessary to do so. It must be noted that even if such an application is made after the end of a relevant

limitation period, a court may well grant an application to add or to substitute the name of Seal Investment Company Limited, as the rule gives the court discretion to do so, if it is satisfied that the addition or substitution is necessary, based on the circumstances of each case (rule 19.4(2)(b)).

[45] It has been noted that during his sworn evidence on February 21, 2020, Chescott Brownie stated that Seal Investment Company Limited (and not the 1st defendant) applied for credit facilities from the claimant, and purchased hardware material from the claimant. Further, Chescott Brownie stated that he believed that "Seal Investment Company Limited owes Tank-Weld", though he did not state precisely what those sums amounted to.

[46] In light of this admission in cross-examination by Mr. Brownie, it seems to me that this is a matter which might be resolved at mediation without the need for a trial. However, at this time, there is an issue to be resolved, and it is whether or not the proper company is before the court as a defendant. The parties' Attorneys-at-Law are therefore encouraged to continue discussions with a view to settling this matter, looking at the strengths and weaknesses of the case globally.

DISPOSITION

[47] In all the circumstances, it seems appropriate that the judgment in default entered against the Defendants be set aside on the ground that there is a defence has a real prospect of success.

[48] In light of the foregoing, I make the following orders:

1. The judgment in default entered against the defendants in Binder 772 Fol 210 is set aside.
2. The claimant is ordered to disclose a more clear and complete copy of the Credit Application Form within 14 days of the date hereof. Permission is granted for the service of this document electronically.
3. The Defendants are permitted to file and serve a defence by August 14, 2020. Permission is granted for the service of the amended defence electronically.

4. The parties must attend mediation by September 30, 2020. Mediation may be conducted by teleconferencing or videoconferencing.
5. Case Management Conference is fixed for hearing on October 29, 2020 at 11:30 a.m. for half hour.
6. The parties are to attend the Case Management Conference. Permission is granted for the parties to attend the hearing by teleconferencing or videoconferencing.
7. Costs to the Claimant to be agreed or taxed.
8. The Attorneys-at-Law for the applicants/defendants are to prepare, file and serve this order. Permission is granted for the service of this order on the Attorneys-at-Law for the respondent/claimant by electronic means.