IN THE SUPREME COURT OF JUDICATURE OF JAMAICA Judgment Book

IN COMMON LAW

CLAIM NO. C.L. 1995/T-263

BETWEEN	CLEOPATRA GLORIA TULLOCH	CLAIMANT
AND	ALBERT GRAHAM	1ST DEFENDANT
AND	BYRON BEASON	2ND DEFENDANT
AND	ENOCH BEASON	3RD DEFENDANT

Phyllis Dyer for Claimant / Respondent

Maurice Frankson for 1st Defendant / Applicant

Heard: October 6th and 7th, 2005

RATTRAY, J.

This is an Application by the 1st Defendant, Albert Graham brought by way of Motion for an Order that the Final Judgment entered herein on the 28th June, 2000 and all subsequent proceedings be set aside. In order for this aspect of the application before the Court to be considered, Mr. Graham also asks this Court that he be granted an enlargement of time to apply to set aside the said Final Judgment notwithstanding that the time stipulated for so doing has expired.

By virtue of Rule 39.6 subsections (1) and (2) of the Civil Procedure Rules 2002, a party who was not present at a trial at which Judgment was entered in his absence may apply to have that Judgment set aside. Such an application must however be made within fourteen (14) days after the date on which Judgment was served on the Applicant.

Albert Graham indicated in his Affidavit that he first became aware that Judgment was entered against him in or about the first week of May, 2005. It is to be noted that this application was filed and dated the 12th July, 2005. No evidence has however been presented on behalf of the Claimant that this Judgment was ever served on Albert Graham, and if so, on what date. Nor is there any admission by him of any such service in order for the procedural clock to commence its countdown. Although Counsel for Claimant / Respondent has complained about the delay by Albert Graham in taking steps to set aside these proceedings, as no specific information has been provided as to when, if at all Judgment was served on Albert Graham, I am prepared to grant the request for the enlargement of time.

It should also be noted that Final Judgment was entered in favour of the Claimant, Cleopatra Gloria Tulloch against all three (3)

Defendants, in June, 2000. Although this application seeks to set aside that Final Judgment, it is brought only by the 1st Defendant and if successful, any Order made would be limited solely to this Applicant.

In the Affidavit of Albert Graham filed in support of this application and dated the 12th July, 2005, Mr. Graham contends:-

(1) That on being served with the Affidavit of Service and Statement of Claim, he contacted his Attorneys-at-Law Messrs Ernest Smith and Company and gave instructions to Ms. Nesta Smith to defend this action on his behalf. An Appearance was entered on the 8th May, 1996 and a Defence dated the 21st May, 1996 filed by that firm.

(2) That he was not served with the Notice of Assessment of Damages in relation to the 2nd and 3rd Defendants, which Assessment was fixed for the 26th June, 2000, nor was he informed or aware that damages were assessed on that date.

(3) That he was not served with the Notice of Trial dated the 20th April, 2000, which fixed the trial date nor was he informed or aware that there would be a trial on the 26th June, 2000 as indicated in the Notice of Trial.

(4) That he was not aware that his Attorneys at Law, Messrs Ernest A. Smith and Company had removed their names from the record as his Attorneys at Law in this matter, as he was never served with any Order of the Court or Certificate in accordance with the Civil Procedure Rules.

In support of these contentions relating to non-service, Mr. Frankson, Counsel for Albert Graham referred to his client's Affidavit and highlighted the paragraph which stated that his client's place of abode was Free Hill District, Bamboo P.O. in the parish of St. Ann. That was the address noted in the Writ of Summons and Albert Graham in his Affidavit stated that he had never removed from nor changed that address. Mr. Graham also exhibited a copy of the Motor Claim Form completed by him in respect of the accident, which brought about these legal proceedings. That document dated the 5th February, 1990, also identified his address as he has maintained.

Mr. Frankson referred to the application by Albert Graham's former Attorneys at law to remove their names from the record and pointed out that the Summons in that matter as well as the correspondence referred to and the Order made were all sent to Albert Graham at 5 Church Crescent, St. Anns Bay in the parish of

St. Ann. This, Counsel stressed, was not the address of his client and explains why he was not aware of those proceedings.

Mr. Frankson also pointed out that the Notice of Trial for this matter was also sent to his client at that same incorrect address and so he had no knowledge of this action being set for trial in June, 2000. Counsel submitted on his client's behalf that Albert Graham had a good and meritorious defence to this claim and a reasonably good prospect of defending this action and asked this Court to grant the Order sought by his client.

Miss Dyer in her response, quite properly conceded that the Notice of Trial had been sent to an incorrect address, which address she said may have been obtained from Mr. Graham's former Attorneys at law. She however contended that the Notice of Intention to Tender in Evidence Hearsay Statement Made in a Document which was sent to Albert Graham's correct address at Free Hill, Bamboo P.O., St. Ann by registered mail did in fact indicate the trial date of June 26, 2000. Nowhere in Mr. Graham's Affidavit did he allege not receiving this Notice. As such Counsel maintained that Albert Graham was well aware of the trial date for this action.

Miss Dyer also challenged Albert Graham's credibility, as he stated in his Affidavit that it was when he was served with the re-

issued Judgment Summons and Affidavit in support in or about the first week of May, 2005, that he first became aware that Judgment had been entered against him. Counsel referred to the Affidavit of Service sworn to by Mr. Dwight Davis, the Bailiff for the Resident Magistrates Court for the parish of St. Ann, where he stated that he served those said documents on Albert Graham, who he knew personally for over five (5) years, on the 8th day of March, 2005. This date is approximately two (2) months before Albert Graham said he was served with the said documents.

Counsel for the Claimant also referred the Court to Rule 39.6 (3) of the Civil Procedure Rules which reads:

> "The application to set aside the judgment or order must be supported by evidence on affidavit showing-
>
> (a) a good reason for failing to attend the hearing; and
>
> (b) that it is likely that had the applicant attended some other judgment or order might have been given or made."

She argued that the Applicant made no submissions with respect to subsection (b), save to say that the Defendant had a good defence and that this in her view was not sufficient.

I am grateful to Counsel for their concise submissions in this matter. In perusing the documents pertaining to the claim herein, I

observe that the unfortunate incident which gave rise to these proceedings occurred on the 1st February 1990, over fifteen (15) years ago. The claim was filed on the 13th December, 1995, and Albert Graham's Defence on the 24th May, 1996.

A Defendant has an obligation once he has retained an Attorney at Law, to check on his matter and to ascertain its status, as he is the person to be directly affected if any Order is made adverse to his interests. It cannot be sufficient to say, as Albert Graham has said, that after retaining his Attorneys at Law, he visited their office on at least two occasions. It must be recalled that those Attorneys at Law entered an Appearance for Mr. Graham in this action on the 8th May, 1996, and as far as he was aware, up to 2005 they were still acting on his behalf. Two (2) visits to his legal representatives over a nine (9) year period show a clear lack of interest or concern on his part almost tantamount to a surrender of any wish to continue to defend the proceedings.

Judgment was entered after a trial in this matter on the 28th June, 2000, over five (5) years ago. A litigant who has obtained a Judgment in their favour has acquired certain rights which are not lightly trifled with. The law prescribes the circumstances under which such rights may be affected. In the present case Rule 39.6 of the

Civil Procedure Rules already referred to, sets out those preconditions.

The Applicant has the obligation to provide the Court with sufficient evidence on Affidavit to fulfil the requirements of the two limbs set out in Rule 39.6 (3). I do not accept the explanation given by Albert Graham for failing to attend the hearing. I am of the view that he was aware of the trial date by way of the Notice of Intention to Tender in Evidence Hearsay Statements. At no time did he assert that he did not receive that document.

I am also satisfied that no evidence whatsoever has been led by Mr. Graham or on his behalf to show that had he attended the trial some other Judgment might have been entered.

In addition, although not necessary for the ruling on this application, I find it interesting that a perusal of the Defence filed on behalf of Albert Graham discloses his assertion that the accident occurred as a result of the Second Defendant colliding into the rear of his motor vehicle. The Claimant was a passenger in the Second Defendant's motor vehicle. However in the Motor Claim Form attached as Exhibit AG 1 to his Affidavit in support of this application, Albert Graham stated that:-

> "On Tuesday February 1, 1990 at about 5:30 p.m. I was on my way from Runaway Bay and heading toward St. Ann's Bay when on reaching Salem main road and proceeding in a line of vehicles at a distance not less than 5 feet away from the car in line of me (sic).
> I then realise that that this vehicle was about to make a stop so I signalled the vehicle behind me and swerve further left of the road but too late. I hit this vehicle into the center rear."

This obviously conflicts with the manner in which Mr. Graham alleges the accident occurred in his Defence.

In that same report, he also indicated that his speed before the accident was the 30 miles per hour and at the time of the accident, he was traveling at the same 30 miles per hour. It would appear on his own admission that he did not slow down before the impact. It is difficult to see on this information how any other Judgment might have been given had the Applicant attended the trial.

In all the circumstances, I find that the Applicant has not provided the evidence necessary to persuade this Court that he is entitled to the Order sought. This application is therefore refused. Costs are awarded to the Claimant / Respondent to be paid by the 1st Defendant / Applicant, such costs to be taxed if not agreed.