[2021] JMSC Civ. 35

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 03608

BETWEEN	**KATHLEEN WILLIAMS**	**CLAIMANT**
AND	**DEVERN LEE**	**DEFENDANT**

IN CHAMBERS

Shanique Gaye, instructed by Zavia Mayne & Company for the claimant.

Suzette Campbell instructed by Burton-Campbell and Associates for the defendant.

Heard: February 4 and 26, 2021

Application to set aside default judgment – Whether the defendant was served with originating documentations – Default judgment allegedly irregularly entered – When did the defendant became aware of the default judgment – Whether the application was made as soon as was reasonably practicable after finding out about the default judgment – Whether the proposed defence has a realistic prospect of success

ANDERSON, K. J

BACKGROUND

[1] The defendant is the applicant. In his amended application for court orders, which was filed on November 27, 2019, he has sought to have this court, set

aside a default judgment which was entered against him, from as long ago, as October 23, 2015.

[2] In the defendant's original application, which was filed on February 20, 2019, he had also sought to have said default judgment, set aside, solely on the ground that he was never served with the claim form and the particulars of claim. In his amended application, he has also contended that in the absence of an order setting aside the default judgment as being irregular, same should be set aside, *'as the defendant has a real prospect of successfully defending the claim.'*

[3] Of course, it is accepted by the parties' counsel and by this court, that if the claim form and particulars of claim, were not served on the defendant, then that means that the default judgment which as entered against him, is irregular and would therefore, have to be set aside by this court, as a matter of course. In fact, an application to this court, would not even have been necessary, if such is accepted by this court. **Rule 13.2 of the Civil Procedure Rule** ('C.P.R'), makes that clear. **Rule 13.2 (1) of the C.P.R**. is always to be interpreted in a mandatory manner, by this court.

[4] That is no doubt why it was, that this court had earlier ordered that the defendant was to have been at court on February 4, 2021, for cross-examination, which he was. He was then cross-examined, in respect of his affidavit evidence, in which he had categorically stated, more than once, that he was never served with the claim form and particulars of claim.

[5] On that occasion, which was on February 4, 2021, when this claim first came on for a hearing that was presided over, by me, there was another person who was also, cross-examined. That person is: Andrew Scott. It was ordered on July 21, 2020, that a witness summons was to have been issued to compel the attendance at court, on February 4, 2021, of the said Andrew Scott (hereinafter referred to as, 'Mr. Scott'). Mr. Scott did so attend court, on that date and was cross-examined, as regards his affidavit evidence, in which he deponed that he

had on August 13, 2015, served upon the defendant, the claim form, particulars of claim and other requisite court documentation.

[6] Several affidavits have been filed by the respective parties, which are directly relevant to the issue as to whether or not the defendant was, or was not served with the claim form, and other originating documentation, with respect to this claim. Some of those affidavits have been appended as exhibits to other affidavits. This court has, in addition to having carefully considered the oral evidence which was provided to this court, by the defendant and Mr. Scott respectively - that being their respective evidence under cross-examination, also so considered, the respective parties' affidavit evidence, that being the affidavit evidence being relied on, by them, on the issue of service of the originating court documentation.

[7] As regards that evidence, which will only be referred to very briefly, for present purposes, it was the evidence of Mr. Scott, that on August 13, 2015, he served the defendant, at Lot 1104, 6th Seal Way, Braeton, Portmore, in the parish of St. Catherine, with the claim form and particulars of claim and other requisite, originating documentation.

[8] There is also, the evidence of a process server employed to the claimant's attorneys, namely Paul Wong, that he served on the defendant, at that address, on July 18, 2017, various, other court documents. That evidence of Mr. Wong though, was never tested under cross-examination and the defendant has, in his affidavit evidence, expressly denied that sworn factual averment, which was made by Mr. Wong.

[9] Not only was Mr. Wong never cross-examined as regards that written and sworn evidence of his, but so too, was the defendant, also, not cross-examined, specifically as regards Mr. Wong's averments of service. In the circumstances, this court has concluded that the evidence of Mr. Wong, cannot assist the claimant in proving service of the relevant, originating court documentation.

Equally too, the evidence of the defendant, specifically in response to the evidence of Mr. Wong, cannot assist the defendant in refuting same.

[10] That is so, because that particular evidence, was never tested, by either party. See: ***Lascelles Chin v Audrey Ramona Chin*** **[2001] UKPC 7.**

Whether the defendant was served with the relevant documentation

[11] As regards the most important evidence, for present purposes, which was tested, I accepted the evidence of the process server – Mr. Scott. I therefore accept that the defendant was duly served with the requisite originating court documentation, on the date as has been alleged by Mr. Scott, that being: August 13, 2015.

[12] Having seen and heard Mr. Scott questioned strongly by defence counsel, Mr. Scott appeared to me, to have given to this court, truthful evidence. It did not at all, appear to me, as though, he had not served said documentation, in the manner as alleged, or on the date as alleged, or that he had not, as the defendant has specifically alleged, served the defendant at all, by means of personal service, such as consists of Mr. Scott having handed him, said documentation, after Mr. Scott had, as Mr. Scott has alleged, met with the defendant, for the very first time, on August 13, 2015.

[13] What was of particular significance for me, was the defendant's evidence, while under cross-examination. It is not necessary, to repeat same, by means of quotation.

[14] For present purposes, it will suffice to state that repeatedly while being cross-examined, the defendant asserted, aspects of his evidence, which were in direct contrast to that which he had expressly asserted in his sworn, written evidence, as filed both on April 16 and September 30, 2019 – that being, two (2) separate affidavits, that he deponed to. In those respective affidavits, at paragraph 12, in the first in time, of same and at paragraph 3, in the second in time, of same, the defendant had expressly asserted that he had lived at the property – 1104 6th

Seal Way, Braeton, Portmore, in the parish of St. Catherine, between the years: 1988 and 1989. Yet, by my count, during his evidence while under cross-examination, the defendant, twice stated expressly, that he either, '*did not live there,'* or '*had not lived there.'* '*There'* is, for present purposes, 1104 6th Seal Way, Braeton, Portmore, in the parish of St. Catherine. The defendant maintained that particular, oral testimony of his, even after having read out loud, during the Chamber's hearing, on February 4, 2021, the evidence which will be in writing for perpetuity, as set out in paragraph 3 of his affidavit which was filed on September 30, 2019. No re-examination evidence was given by the defendant, as defence counsel opted not to re-examine him.

[15] Thus, no explanation has been provided by the defendant to this court, of this apparent dichotomy in his evidence, as to whether or not he had ever lived at 1104 6th Seal Way, Braeton, Portmore, in the parish of St. Catherine, which is the address that he was at, when he was, as has been purported by Mr. Scott and now accepted by this court, served with the requisite originating documentation, regarding this claim.

[16] The defendant while under cross-examination, testified that he had visited and that he visits 1104 6th Seal Way, Braeton, Portmore, in the parish of St. Catherine. When he was asked by the court counsel, how often would he visit there, the defendant's response was that he does not visit there, often and that he would go to visit his uncle who still lives there, *'maybe once every six (6) months.'*

[17] When asked specifically, by cross-examining counsel, whether his uncle still lives there, the defendant's answer was just as specific as was the posed question and his answer was just as unhelpful to him for present purposes, as were his other answers, during cross-examination. His answer to that question was '*Yes.'*

[18] Yet, at paragraph 5 of his affidavit which was sworn to, on September 27, 2019 and filed three (3) days later, the defendant deponed as follows:

> *'That since leaving in 1989 I have not been back to 1104 6th Seal Way, Braeton, Portmore in the parish of St. Catherine as my uncle is no longer at the property and resides in New York.'*

[19] The dichotomy in his evidence both as to whether he visits the property, *'maybe once every six (6) months,'* and also, as to whether or not his uncle still lives there, is also apparent and is also, unexplained.

[20] In the circumstances, I do not accept the defendant as a witness of truth, on any of those issues in respect of which, those dichotomies as noted, have arisen. I have therefore concluded, since I have accepted that Mr. Scott is a witness of truth as regards the service of the originating claim documentation on the defendant, that the defendant was untruthful to this court, as regards same.

The burden of proof

[21] It is to be noted as regards this application issue, that the defendant was the party who, for present purposes, bore the burden of proof as regards the issue of the disputed service of the originating claim documentation. See: **Nadine Billone v Experts 2010 Company Ltd [2013] JMSC Civ. 150**, especially at paragraph 10. That is so because it is he who must prove his averment as regards same, in order to succeed upon his application to set aside default judgment, on the ground that said judgment was irregularly obtained. In my view, the defendant has wholly failed to meet that burden, which required that, if he were to be successful in proving that averment of his, he would have had to have proven same to this court, on a balance of probabilities.

Whether the defence has a real prospect of successfully defending the claim

[22] I must therefore, now begin to address the issue as to whether or not, the default judgment, which I have concluded, was regularly obtained, should be set aside on the ground that:

'Pursuant to rule 13.3 of the Civil Procedure Rules 2002 the 3rd Defendant has a real prospect of successfully defending the claim.' *(highlighted for emphasis)*

[23] It must be stated firstly, in addressing same, that since there is no third defendant existing, in respect of this claim, this court has considered and taken it that the reference to, '*the 3rd Defendant'* was made in error and will treat same, as instead constituting a reference to the defendant.

[24] In addressing same, this court has carefully considered the respective parties' written submissions and the authorities referred to, therein.

[25] **Rule 13.3 of the C.P.R,** addresses the circumstances in which this court **may** (highlighted for emphasis) set aside or vary a default judgment.

[26] It is necessary to quote that rule in full. That rule, reads as follows:

> *'(1) The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defendant 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 acknowledgement of service or a defence, as the case maybe.*
>
> *(3) Where this rules gives the court power to set aside a judgment the court may instead vary it.'*

[27] My reading of those rules of court, makes clear to me, that the pre-eminent consideration for this court, in determining whether a default judgment ought to be set aside, is whether or not the defendant has a real prospect of successfully defending the claim. Whilst that is undoubtedly the pre-eminent consideration

though, this court must also consider the matters as set out in **rule 13.3(2)(a) and (b) of the C.P.R.**

[28] Of course too, **rule 13.3(1) of the C.P.R**. has been framed in discretionary terms. To my mind therefore, this court must, in applying its mind to **rule 13.3 of the C.P.R.,** apply the over-riding objective under and in accordance with the rules of court, in the course of exercising its discretion, as **rule 13.3** as a whole, requires this court, to do. See: **Merlene Murray-Brown v Dunstan Harper and Winston Harper [2010] JMCA App 1** and **Marcia Jarrett and South East Reional Health Authority and Robert Wan v The Attorney General** – **Claim No. 2006 HCV 00816** and **Nadine Billone and Experts 2010 Company Ltd.** (op. cit.)

Whether the defendant applied to this court as soon as was reasonably practicable after finding out that judgment had been entered

[29] With respect to this matter, the relevant default judgment was entered into the judgment book, on October 23, 2015. That default judgment was entered, arising from the defendant not having filed and served, an acknowledgement of service.

[30] The defendant's original application to set aside that default judgement, was filed, approximately three and a half years later, on February 20, 2019. That is the applicable date, for present purposes, even though an amended application to set aside the default judgment is that which is now under consideration by this court and same was filed on November 27, 2019.

[31] The question that must now be asked and answered, is: Did the defendant apply to this court as soon as was reasonably practicable after finding out that judgment had been entered?

[32] The defendant's evidence, as given on affidavit, as regards how and when it was, that he became aware of the default judgment that had been entered against him, is worthwhile repeating: That evidence is as set out in paragraph 34 below and consists of that which relates to what purportedly occurred, according to that

which the defendant is purportedly aware of, as having occurred after the claimant had allegedly been injured in an accident which purportedly occurred while the claimant was a passenger in a public passenger vehicle, which, it is not disputed, was, at the time of the accident, jointly owned by the defendant and another person or persons.

[33] The claimant's allegation, as set out in her statement of case, as filed with this court and which this court has taken judicial notice of, has alleged that:

> *'On or about the 31st day of March 2014 the Claimant was lawfully travelling as a passenger in a motor vehicle registered PC 7432, owned and driven by the Defendant along the Runaway Bay Main Road, St. Ann, when upon reaching the vicinity of Dr. Bruce Auden's office, the said motor vehicle stopped to allow a passenger to disembark and whilst the Claimant was in the process of reboarding the motor vehicle, the driver drove off causing the Claimant to fall from the bus.*
>
> *.... As a consequence of the said collision the Claimant has sustained serious personal injury and has suffered loss and damage.'*
>
> *(Paragraphs 3 and 4 of the claimant's particulars of claim).*

The claimant's claim against the defendant is for damages for negligence.

[34] The defendant's evidence, as set out in paragraphs 8, 9, 10, 11, 12 and 17 of his affidavit in support of his application to set aside default judgment and which was filed on April 16, 2019, is as follows:

> *'8. That about two years after the incident I received a telephone call from an employee of the insurance company. I was asked whether I had been involved in an accident with Kathleen Williams. As a result of the conversation I went to the insurance to inform them about what took place with Ms. Williams. I subsequently gave a statement to an investigator appointed by the insurance company.*
>
> *9. That on or about the 30th January 2019 I received a call from my insurer. I was informed by them and do verily believe that a judgment had been entered against me in a claim filed by Ms.*

Williams to recover damages for injuries she suffered in an accident involving my motor bus on the 31st March 2014.

10. That I was not aware that a claim had been filed against me by Ms. Williams as I never received any court papers from her or anyone acting on her behalf, and only became aware of it because of the information from my insurer.

11. That on the 19th February 2019 I met with Burton-Campbell and Associates, Attorneys-at-Law who were appointed by my insurance company to act on my behalf in this claim. I was shown an Affidavit of service sworn to by Andrew Scott in which he stated that on the 13th August 2015 at 2:24 p.m. he served me with a Claim Form and Particulars of Claim among other documents, at 1104 6th Seal Way, Braeton, Portmore, in the parish of St. Catherine.

12. That I do not know an Andrew Scott and I was not served with the documents mentioned or any other documents by him or anyone else. I lived at 1104 6th Seal Way, Braeton, Portmore in the parish of St. Catherine from 1988 to 1989, after which I went on the farm work programme to the United States, after which I migrated and lived there until 2002.

15. That I would not have been at 1104 6th Seal Way, Braeton, Portmore in the parish of St. Catherine at 2:24 p.m. to be served with any document.

17. That I was deprived of the opportunity of defending the claim as the Claim Form and Particulars of Claim were never served on me. I also did not receive the Default Judgment Notice of Assessment and other documents which were allegedly served on me on the 12th March 2016.'

[35] It is also worthwhile repeating, verbatim, what was the process server – Mr. Andrew Scott's affidavit evidence in response to the defendant's application to set aside default judgment. Paragraphs 4, 5, 6 and 7 of the affidavit that has been deponed to, by Mr. Scott and which was filed on September 6, 2019, are relevant for that purpose.

[36] Prior to having stated that which he stated in those paragraphs, Mr. Scott deponed in that said affidavit that he is a process server and his duties as a process server entail the serving of court documents on behalf of Messrs. Zavia

Mayne and Company and their clients. It is to be noted, that the law firm on record for the claimant, with respect to this claim, is Zavia Mayne and Company.

[37] Paragraphs 4, 5 6 and 7 of that affidavit, read as follows:

> *'4. That I attended the Kingston branch office of Zavia Mayne and Company, Attorneys-at-Law located at Seymour Avenue, Kingston 6 and was handed a Claim Form, with Prescribed Notes, a form of Acknowledgement of Service, a form of Defence and Particulars of Claim with instructions to serve same on Mr. Devern Lee at Lot 1104 6th Seal Way, Braeton, Portmore in the parish of Saint Catherine.*
>
> *5. On the 13th day of August 2015 I went to the abovementioned address. Upon arriving at the address, I made further enquiries as Mr. Lee was not previously known to me, he admitted that he was the defendant, I handed the documents to him and he willingly accepted same.*
>
> *6. That on March 12, 2016 the copies of the Witness Statement dated January 14, 2016, Notice of Assessment of Damages dated February 26, 2016, Notice of and Intention to Tender in Evidence Hearsay Statements made in Documents dated February 11, 2016 and request for Default Judgment dated October 23, 2015 and Interlocutory Judgment in Default dated October 23, 2015 in this suit dated July 21, 2015 and bearing the seal of the Supreme Court of Jamaica were duly served by me on the Defendant Devern Lee personally at Lot 1104 6th Seal Way, Braeton, Portmore in the parish of Saint Catherine.*
>
> *7. Again he accepted the documents without any dispute.'*

[38] Suffice to state also, that such as has been stated and quoted from, in paragraphs four (4) to seven (7) of that affidavit, echo that which was stated and sworn to, by Mr. Scott, in his earlier affidavit, which was filed on April 26, 2016.

[39] For the same reasons earlier given, I do not accept that the defendant was a witness of truth, as regards the service of pertinent court documents on him, at 1104, 6th Seal Way, Braeton, Portmore, in the parish of St. Catherine, by Mr. Scott – the claimant's counsel's process server. I instead accept that on two separate occasions, those being: August 13, 2015 and March 12, 2016, the

defendant was served with various documents pertaining to this claim, including but not limited to the claim form and particulars of claim and all requisite accompanying documentation and the default judgment.

[40] This claim was filed on July 21, 2015. The default judgment was entered against the defendant, on October 23, 2015. That default judgment was entered, arising from the defendant's failure to file an acknowledgement of service.

[41] For the reasons already given, it follows that I am not of the view that the defendant applied to this court, *'as soon as was reasonably practicable after finding out that judgment had been entered against him*,' since it is the view of this court that the defendant should have made an application to set aside default judgment, within a short time after he was served, with the default judgment, that having in this court's view of the evidence given, been on March 12, 2016.

[42] In any event though, the defendant ought to have provided to this court, an account as to why it was not reasonably practicable for him to have filed the original application to set aside default judgment, prior to when he did so, that having been, on February 20, 2019. He has not done so. According to the defendant's own evidence, he became aware of the default judgment that had been entered against him, when he was told of same by his insurer, during a telephone call that took place, on January 30, 2019. It is that same insurer that hired attorneys: Burton-Campbell & Associates, who are on record as the defence attorneys, with respect to this claim and who are the attorneys that filed the original and the amended application to set aside, default judgment. Why then, did it take until February 20, 2019, for that application to be filed? Why was it not reasonably practicable for same to have been filed, before then? Even until now, the answers to those questions remain unknown to this court. Those answers remain unknown to this court, because the defendant has not even done as much as attempted to provide the answers to either of same.

[43] It also follows, that the defendant has utterly failed to provide this court with, '*a good explanation for the failure to file an acknowledgement of service.'* This court has determined that the defendant's explanation for same, is entirely untrue.

Whether the proposed defence has a realistic prospect of success

[44] This court must then, next consider that which is, the most important consideration, which is whether the defendant's proposed defence is one which has a realistic prospect of success.

[45] The term, '*realistic prospect of success,*' is used by me, rather than, *'real prospect of success'* – the latter being the phraseology used in our rules of court, because, those terms can be used interchangeably. See: **Swain v Hillman [2001] 1 All ER 91,** in that regard. In any event though, I believe that the term, *'realistic prospect,'* can be more readily understood and easily applied, than the term, '*real prospect.'*

[46] The latter – mentioned term, was utilized in the court's judgment in the case – **Swain v Hillman** (op. cit). It has been applied repeatedly in this nation's courts.

[47] In considering whether or not the defendant's defence is one which has a realistic prospect of success, it must be understood that, as was stated by Moore-Bick J. in **International Finance Corporation v Uerxafica SRM (2001) CLC 1361:**

> *'A person who holds a regular judgment, even a default judgment, has something of value and in order to avoid injustice he should not be deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice in favour of setting the judgment aside ... the expression "realistic prospect of success" in this context means a case which carries a degree of conviction.'*

[48] In **E.D. and F Man Liquid Products Ltd. v Patel [2003] EWCA Civ 472**, the Court of Appeal of England, confirmed that the test is the same as for summary judgment. The only significant difference is that in a summary judgment application, the burden of proof rests on the claimant to show that the defendant has no real prospect of success, whereas in an application to set aside a default judgment, it is for the defendant to show that his defence has a real prospect of success.

[49] That is why, for instance, in the following cases, the court considered carefully, whether the respective defendants proposed defences, had any realistic prospect of success and determined that they did not. see: **B & J Equipment Rental Limited and Joseph Nanco [2013] JMCA Civ 2** and **Citizens Bank Limited and Randolph Green – Claim No. 1998 C.L.C. 120.**

[50] In assessing whether or not the defendant's proposed defence, with respect to this claim, has any realistic prospect of success and thus, whether same is more than merely arguable and bearing in mind, while conducting that assessment, that it is the defendant that bears the burden of proving same, on a balance of probabilities, if he is to be successful in his application to set aside the default judgment which has been entered against him, this court has borne in mind, that the claimant's claim is for damages for negligence.

[51] The background to that claim, having earlier been set out, I will now proceed to address the proposed defence. The same has been addressed by the defendant, in all of his affidavit evidence. In two of those affidavits, he specifically deponed to that which he alleges, had transpired, as regards the claimant as a passenger on the bus which the defendant was then driving and also, which the defendant was then a co-owner of. He has additionally, appended to a third affidavit of his, a copy of his draft defence.

[52] The essence of that defence is set out in paragraphs two (2) to five (5) of that draft defence. It is necessary, for present purposes, to quote same. They read, as follows:

> *'2. Save and except that the claimant was a passenger in motor vehicle licensed PC 7432 on the 31st March 2014, paragraph 3 of the Particulars of Claim is denied.*
>
> *3. It is specifically denied that that the Defendant was in an accident with the claimant or that he drove off while the claimant was boarding the bus causing her to fall.*
>
> *4. The Defendant will say that he was driving along the Runaway Bay Main Road when he heard the claimant complaining to the conductor that she was injured. The Defendant saw no visible injury on the Claimant at the time she made the complaint or at any time thereafter.*
>
> *5. It is denied that the claimant was injured while travelling on the Defendant's motor bus and she is put to strict proof of her allegations. Further the Defendant objects to the medical reports of Doctors Auden and Grey being tendered n evidence as hearsay documents and requires the makers to attend at the trial of this claim for cross examination.'*

[53] It is also necessary, for present purposes though, to refer specifically to paragraph two (2) to seven (7) of the defendant's affidavit which was filed on April 16, 2019. Those paragraphs read as follows:

> *'2. That in 2014 I was the joint owner of a Toyota Hiace motor bus licensed PC 7432. It was a registered public passenger vehicle and operated on the route Brown's Town to Ocho Rios and Spanish Town. I was the driver of the vehicle.*
>
> *3. That on the 31st March 2014 I was driving the bus heading from Ocho Rios to Brown's Town. I was accompanied by a conductor known to me as Marlon. The bus was not full as not all the seats were taken. On reaching the vicinity of the Runaway Bay hotel now known as Jewels I stopped to let off a passenger. The person came of the bus. I heard the passenger door being closed and I drove off.*
>
> *4. That after I drove off I heard an argument between the conductor and a passenger I stopped to find out what was happening. I saw a*

woman known to me as Kathleen Williams in the bus complaining that the door had hit her on her left foot. There was no visible injury but I took her to a doctor which was across the road from where I stopped.

5. That I left and dropped the other passengers in Brown's Town and came back to the doctor. The doctor had not yet examined Ms. Williams and I waited with her for twenty minutes, during this time I still did not see anything wrong with her. After she was examined she came out with a little tube with some ointment.

6. That I took her home. She was able to get in and out of the bus without any difficulty. I saw her the day after the incident and she said she was fine.

7. That I did not make a report to the police or to the insurer of my bus, Advantage General Insurance Company as it was a minor incident.'

[54] The claimant has deponed to an affidavit which was filed, in response to the defendant's application, later amended, to set aside default judgment. That affidavit was filed on September 6, 2019. In that affidavit, she has given evidence as to how the relevant incident, which she alleges, led to her injury and loss and thus, the present claim, occurred. In that affidavit of hers, she has referred to the defendant's affidavit which was filed on April 16, 2019.

[55] She has stated in that affidavit, collectively, as follows:

'In paragraph 4 of his Affidavit he stated that the door hit me on my left foot, but that is not the case. A passenger on the bus made an indication that he had reached his destination. The conductor told the defendant to stop. He brought he bus to a halt but was not paying attention as the passengers were boarding and disembarking the bus. This I believe, based on the conversation he was having at the time with his conductor, was because he was in a hurry to get to the bus park to load before the other buses got to the park. As he stopped to allow the passenger to get out, I had to stop outside the bus to allow persons to pass. While I attempted to get back in, with one foot on the step to get in, the driver without due care and attention proceeded to drive causing me to fell from the bus. It was when he was alerted by other passengers that he stopped as I was able to get in. I was badly injured and in pain, I was so frightened. I could have died had things taken a different

turn. The driver upon seeing this took me to the doctor as he admitted in his affidavit and even waited with me a while. That the following day I experienced even more pain in my legs and knees, my elbows were sore and my right arm was tender to touch.'

[56] Considered in the context of the claimant's response to his evidence, the defendant's evidence that he saw no injury to the claimant, arising from that which she alleges, was her having fallen off of the bus, which she had one foot on, while about to fully step onto that bus, at that time, is of very little weight, if any.

[57] It is of very little weight, because, even though there may not have been any noticeable injury on the claimant, at the material time, that cannot be taken as any proof whatsoever, that the claimant did not receive any injury.

[58] No evidence has been given, either by the defendant, or the claimant, as to what type or types of clothing the claimant was wearing at the time when she was allegedly injured and what areas of her body, such clothing would have covered. The presence of clothing, on the claimant's body, at the material time, may very well, in and of itself, have prevented anyone other than the claimant from having been able to have viewed any physical injuries on the claimant's person at that time.

[59] In any event though, a person can endure pain and suffering without there having been any visible, or any immediately visible, or any immediately visible injury. If such was caused, due to the negligence of the defendant, then the claimant is entitled to an award of damages from this court, pertaining to same, if the defendant does not settle the dispute, out-of court.

[60] Interestingly, the defendant has not specifically denied that the claimant fell from the step of the bus. He has instead, suggested that when he realized that the claimant was complaining, she was then already on the bus and complaining about the bus door, having hit her.

[61] It is strange that despite that which the defendant has alleged, he nonetheless accompanied the claimant to the hospital and, if his account is to be believed, also looked on the claimant's physical condition, the very next day, so that he was able to and did swear that he did not see any injury on the claimant, the next day.

[62] Furthermore, the defendant was not specifically denied the claimant's evidence that he had brought the bus to a halt, but was not paying attention then, while passengers were embarking and/or disembarking the bus and that he (the defendant) was then conversing with his conductor as regards his being in a hurry, *'to get to the bus park to load, before other buses got to the park.'*

[63] In addition, this court has taken judicial notice of a document which was filed on February 11, 2016 and which is headed – '*NOTICE OF AND INTENTION TO TENDER IN EVIDENCE HEARSAY STATEMENTS MADE IN DOCUMENTS,*' which refers to a number of documents that the claimant intended to rely on as hearsay evidence. Among those documents are several receipts for physiotherapy treatment that the claimant received. In addition there are two medical reports attached to that document, one of which was prepared by Dr. Auden and the other prepared by Dr. Guy. Dr. Auden's report is more helpful than is that which was prepared by Dr. Guy and therefore, I will for present purposes, only refer further to the former.

[64] Dr. Guy's report, refers to the relevant, alleged accident involving the claimant and the date of same. That doctor referred to the claimant as having an '*abrasion'* over the, '*patellar region'* of the left knee. In addition the doctor has reported that, *'On examination she was tender over the proximal right arm anteriorly'* – in reference to the claimant.

[65] The claimant has obtained a final judgment upon this claim. An assessment of damages hearing took place on March 13, 2018. The claimant was present at that hearing, while neither the defendant nor his counsel were then present.

Judgment on that assessment was reserved until March 23, 2018, which is when the court awarded final judgment, to the claimant. The claimant was awarded general damages in the sum of $855,000.00, special damages in the sum of $57,300.00 and costs in the sum of $40,000.00.

[66] This court has taken judicial notice of the outcome of that assessment of damages, heard in this court and has inferred from same that the claimant has, before this court, proven her loss, arising from the judgment which she obtained against the defendant, with respect to her claim against him, for damages for negligence, arising from the relevant vehicle accident. If she had not proven same upon that assessment hearing, then she would not and could not properly have been awarded damages, arising from same.

[67] This court has carefully borne in mind that, for present purposes, it is the defendant that bears the burden of proof. To my mind, he has failed to meet that burden. He has failed to meet his burden of proving that he was not served with the relevant originating documents pertaining to this claim and also his burden of proving that he acted promptly in having applied to set aside judgment after he became aware that a default judgment had been entered against him. He has also failed to establish that he has anything more than a merely arguable defence. His proposed defence is, in the particular circumstances of this case, not one which has any real prospect of success.

[68] This court has also borne in mind, the overall interests of justice in exercising its discretion. The fact that a final judgment has been entered against the defendant, is a factor to be considered by this court , in this case and is, *'highly relevant,'* to this court's exercise of that discretion. See in that regard: **Strachan v Gleaner Co. Ltd and anor [2005] 1 WIR 3204.**

[69] Bearing in mind that no good reason has been placed before this court, by means of evidence which this court has accepted, that there exists any good reason why the defendant could not have acted and did not act with some

degree of alacrity, in responding to this claim and bearing in mind the length of time which has passed between the date of the relevant bus incident and the date when the defendant filed his original application to set aside default judgment and also bearing in mind that the claimant has obtained in her favour, an award of damages, as part and parcel of a final judgment in this matter, it seems to me that the court's discretion ought necessarily, in the circumstances, to be heavily weighted, comparatively, quite favourably to the claimant, as against the defendant. The most significant nail in the coffin of this amended application though, is the fact that the defendant's proposed defence, has no realistic prospect of success. The amended application therefore fails and the claimant will be awarded, as against the defendant, the costs of same.

DISPOSITION

[70] In the circumstances, this court's orders, are as follows:

1. The defendant's amended application to set aside default judgment, which was filed on November 27, 2019, is denied.

2. The costs of that amended application are awarded to the claimant and such costs shall be taxed if not sooner agreed.

3. Leave to appeal, is granted to the defendant.

4. The claimant shall file and serve this order.

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Hon. K. Anderson, J