



[2024] JMSC Civ 46

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020CV04630

BETWEEN	TARIQUE BROWN	CLAIMANT
AND	CHARLES AUGUSTUS PEART	1ST DEFENDANT
AND	WILTON HAYMAN	2ND DEFENDANT

IN CHAMBERS

M. Jeffery Daley instructed by Betton-Small, Daley & Co for the second Defendant.

Mr. Sean Kinghorn instructed by Kinghorn and Kinghorn for the Claimant.

Heard: 18th and 29th April 2024

Application to set aside default judgment- service of documents- Non-service of Form 6- Rule 8.16 (1) of the Civil Procedure Rules 2002

L. SHELLY WILLIAMS, J

Background

[1] The claim arises from a collision between the Claimant and a coaster bus owned by the second defendant and driven by the First Defendant. The Claimant filed an affidavit of service dated the 18th October 2017 in which the process server, Mr. Delroy Blake, averred that he served a number of documents on the second defendant. The documents that Mr. Blake indicated that he served included;

(a) Sealed copies of the Claim Form filed on the 29th of August 2016:

- (b) A Form of Acknowledgement of Service pursuant to Rule 8:16 (1) (a) of the Civil Procedure Rules 2002:
- (c) A Form of Defence pursuant to Rule 8:16 (1) (b) of the Civil Procedure Rules 2002;
- (d) The Prescribed Notes for the Defendant pursuant to Rule 8:16(1) © of the Civil Procedure Rules 2002;
- (e) Particulars of Claim filed on the 29th of August 2016.

The First Defendant was never served with the documents.

- [2]** Default judgement was entered against the Second Defendant on the 20th of October 2017 after he failed to file an acknowledgment of service in the case. The Second Defendant on the 31st of July 2023 filed an application along with an affidavit to set aside the default judgement on the basis that the documents were never served on him. The Claimant relied on the affidavit of service along with the attached exhibits that were filed on the 20th of October 2017.
- [3]** The matter was heard on the 18th of April 2024 where Mr. Hayman, the Second Defendant and Mr. Delroy Blake was cross-examined. Mr. Hyman gave evidence that he was never served with the documents. He indicated that he owns several coaster buses, and that he had been sued on several occasions in the past by the law firm of Kinghorn and Kinghorn, however, he had never been served with documents by their process server. Mr. Hayman admitted that he had received a letter in relation to this case from the law firm of Kinghorn and Kinghorn, however, his evidence was that the letter had only been left at his office.
- [4]** Mr Delroy Blake gave evidence on behalf of the Claimant, that he had personally served the documents in question on Mr Hayman. His evidence was that he had visited the address on the documents, but Mr. Hayman could not be located at the address. He then went to the business place of Mr. Hayman, which he knew before, and served him personally with the documents.

- [5] The question as to whether the documents were served on the Second Defendant comes down to a matter of credibility. In giving his evidence, I noted that Mr. Hayman appeared to be quite hesitant. Mr. Hayman paused on several occasions when giving evidence. I especially noted that when asked whether he knew Mr Delory Blake before, Mr Hyman appeared to be unclear as to the answer he was to give. Mr Blake was then asked to enter the court and on seeing him Mr Hayman indicated that he 'does not recall his face.' Under further cross-examination Mr Hyman stated that he 'does not have a memory problem, but he was not good at remembering faces.'
- [6] Mr. Delory Blake gave very clear answers to the questions posed under cross examination. He was able to describe the exact area where he served the documents on the second defendant.
- [7] I found Mr. Blake to be forthright in his answers to the questions posed to him. In contrast I found Mr. Hayman to be hesitant and appeared to be making things up during the cross examination. I found it remarkable that Mr Hayman agreed that he had been served documents from the law firm of Kinghorn and Kinghorn, but then make tremendous effort to deny knowing Mr. Blake the process server. I accept the evidence of Mr. Blake and find that abovementioned documents were served on the Second Defendant on the 18th of October 2017.
- [8] During closing submissions, counsel for the Second Defendant indicated that, based on the evidence of the Claimant, there was one document that had not been served on his client as required by rule 8.16 (1) of the Civil Procedure Rules (2002) (CPR). The form that had not been served was for the individual to pay by instalments. Counsel's position was that this was a fatal flaw that would automatically lead to the default judgment ought to be set aside. In support of his position, Mr Daley relied on the case of **Dorothy Vendryes v Dr. Richard Keans and another** [2011] JMCA Civ 15 (**Vendryes**). Mr. Kinghorn's position was this was not a case which fell under Rule 8.16(1) (e) where the form for instalment must be served. Mr. Kinghorn's position was that in the event this document should

have been served, this could be cured in case management. Mr Kinghorn sought to rely on the case of **Joseph Nanco v Anthony Lugg** [2012] JMSC Civil 81 (**Nanco**).

[9] Counsel Mr. Daley sought to rely on rule 8.16 (1) as the basis of setting aside the default judgment which states that:

(1) When a claim form is served on a defendant, it must be accompanied by –

(a) a form of acknowledgment of service (form 3 or 4);

(b) a form of defence (form 5);

(c) the prescribed notes for defendants (form 1A or 2A);

(d) a copy of any order made under rules 8.2 or 8.13; and,

(e) if the claim is for money and the defendant is an individual, a form of application to pay by instalments (form 6)

[10] This rule dictates the forms that must be served on the defendant by the claimant. The forms listed in rule 8.16 (1) must be served at the time of the service of the particulars of claim and the claim form. Rule 8.16 (1) (e) ie the form for payments by instalments, is required to be served only in the event the claim is one for money.

[11] The case of **Vendryes** concerned a claim for specific performance and for damages for a specific amount arising from two agreements signed by the parties for the sale of chattel and the sale of property. The forms listed in rule 8.16(1) (a) to (c) had not been served on the defendant. Harris JA at paragraphs 12 and 27 of the decision opined on rule 8.16 (1) and stated that:

[12] Rule 8.16 (1) expressly specifies that, at the time of service, the requisite forms must accompany the claim form. The language of the rule is plain and precise. The word “must”, as used in the context of the rule is

absolute. It places on a claimant a strict and an unqualified duty to adhere to its conformity. Failure to comply with the rule as mandated, offends the rule and clearly amounts to an irregularity which demands that, in keeping with the dictates of rule 13.2, the default judgment must be set aside. The learned judge was correct in so doing.

[27] The claim form upon which the learned judge proceeded lacked validity, in that it was not in compliance with rule 8.16(1). It would have been a nullity and ought not to have been acted upon.

[12] The case of **Vendryes** speaks generally about complying with Rule 8.16(1) and does not specifically address rule 8.16(1)(e). In the case of **Nanco McDonald - Bishop J** (as she then was) did seek to differentiate between the different sections of rule 8.16(1). In that case the 2nd Defendant was not served with the Prescribed Notes to the Defendant and a Form of Defence with the claim form in accordance with CPR, 8.16(1). The Defendant had filed an acknowledgment of service but failed to file a defence. There was also a hearing on interim payment which the Defendant had participated in. McDonald-Bishop J stated at paragraphs m37 and 38 of the judgment that:

[37] As already noted, rule 8.16(1) that makes provision for the inclusion of such documents in service of the claim on the defendant is silent as to the consequences that should flow for non-compliance. A perusal of the CPR does show provisions where consequences are set out for failure to comply with certain rules. I have noted, in particular, that it would seem to be that where the rules intend that the validity of the claim itself should be affected, that is expressly stipulated. A look at rule 8.4 (1), for instance, would serve to demonstrate this. That rule stipulates, without question, that the claim form "ceases to be valid" if it is not served within 12 months of the date it was issued. The notice to the defendant that is attached to the claim form and which was served on the 2nd defendant itself stated this too in no uncertain terms.

[38] There is nothing by statute, rules, practice direction or case law to say that failure to serve any such documents automatically affects the validity of the claim itself. In fact, there is nothing in the judgment of the Court of Appeal in Vendryes that would serve to lend support to such an argument. Therefore, I cannot agree with the view expressed by Mr. Jones, that the proceedings commenced by the claim form would not be valid due to non-service of the documents in issue, without more. I take the failure on the part of the claimant to serve such documents as requested by rule 8.16 (1) as an irregularity in service.

[13] The case of **Nanco** addresses the approach to be adopted in the event there is an irregularity in the service of documents. I do not find that the facts of this case rise to the level of irregularity in that a required document was not served. The forms that are to be served on the defendant as per rule 8.16(1) a to c seek to assist a defendant on being served with particulars of claim and a claim form. The Notice to the Defendant stipulates the time period in which an Acknowledgment of Service must be filed. The Prescribed Notes for the defendant also give instructions and timelines for the filing of the Acknowledgment of Service, along with instructions on the filing of a defence. The defence form gives guidelines as to what is to include in a defence. The form to pay by instalments ie form 6 is understandably optional to money claims. On perusal of form 6, it clearly shows that form is to served where

- a. where there must be a stipulated sum that is being claimed.
- b. The defendant has the option of acknowledging that this sum is owed,
- c. The defendant is unable to pay the undisputed sum in a lump sum
- d. and wishes to pay it in instalments.

[14] The case before the court is for negligence. The issue of liability would have to be decided by the court, prior to a sum being awarded for any injuries sustained by the claimant. This could not be defined as a claim for money and as such there was no requirement to serve the form 6 as per rule 8.16(1)(e) and as such the default judgment will not be set aside.

Conclusion

[15] The Second Defendant has failed to satisfy the court that Form 6- ie the form to pay by instalments was required to be served in this case. I find that claimant had served all the required documents under rule 8.16(1) along with the particulars of claim and the claim form.

[16] Orders

1. The application to set aside default judgment filed on the 31st of July 2023 is refused.
2. Cost to the Claimant to be agreed or taxed.
3. Pre-trial review for assessment of damages is set for 25th of September 2024 at 12.30 pm for half an hour.
4. Claimant's Attorney-at-law is to prepare, file and serve the order.