NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 1998 C.L. C. 120

IN CHAMBERS

BETWEEN	CITIZENS BANK LIMITED	CLAIMANT
AND	RANDOLPH GREEN	DEFENDANT

Ms. Dacia Welds instructed by Phillipson Partners for Claimant.

Ms. Tanya Walters instructed by Chandra Soares & Co. for Defendant.

Practice and Procedure – Application to set aside default judgment – Whether Writ of Summons served - Delay in filing Application – Whether Defence has any real prospect of success – Rules 13.2 and 13.3 of the CPR

19th November 2008 and 6th January 2009

BROOKS, J.

In September 1995 Mr. Randolph Green secured a loan from Citizens Bank to purchase a motor vehicle. The vehicle was used a part of the security for the loan. Mr. Green defaulted in making the payments and the bank repossessed the vehicle. There is a dispute as to whether the vehicle was returned to Mr. Green but in March 1998 the bank filed this claim against him to recover the loan principal as well as interest thereon.

No appearance was filed to the claim and after many attempts judgment in default of appearance was entered on March 4, 2005. Mr. Green asserts that he was not aware of the claim until an Order for Seizure and Sale was executed against his property. The present application is for

the default judgment to be set aside and for Mr. Green to be allowed to file a defence in respect of the claim.

The relevant rules to be considered in assessing Mr. Green's application are rules 13.2 and 13.3 of the Civil Procedure Rules (CPR). The former if applicable, would result in Mr. Green being entitled as of right to have the default judgement set aside. I shall therefore consider it first.

Rule 13.2

In considering this rule the main issue to be resolved is whether Mr. Green was served with the Writ of Summons. In support of his position, Mr. Green deposes that he was not at the address at which the process server said that effected service. Mr. Green said at paragraph 6:

> "That I have had my business at 43 Grove Road, Linstead, P.O. in the parish of Saint Catherine since 1989 operating between 8 a.m. and 5 p.m. until 2 weeks ago, but never receive (sic) the [Writ of Summons] there."

Miss Walters, on his behalf submitted that it was her understanding of her instructions that the number "43", as used in the paragraph, is in fact an error and that the correct number should be "42A".

Mr. Green denies that he was served at his business place; he says at paragraph 7:

> "That the Affidavit of Service sworn to by Mr. Festus Bell is untrue as I was never served at my business place or at for that matter with any documents whatsoever relating to this suit."

It is to be noted, however, that the process server, Mr. Bell, did not mention service at Mr. Green's business place. Mr. Bell merely stated the address of service as "42 Grove Road, Linstead".

The impression that Mr. Green gives is that he had nothing to do with No. 42 Grove Road. That does not accord with the documentation.

The documents in fact, give two addresses for Mr. Green, namely No. 42 and No. 42A Grove Road. The Promissory Note signed by him and a letter of demand addressed to him, state his address as No. 42A. The Bill of Sale which he signed, the commitment letter issued by the bank, the bank's statement of his account and other documents state his address as No. 42.

The explanation seems to be contained in a letter dated April 15, 1998, which was issued by the bank to the collection agency which was set in motion against Mr. Green. The agency was Global Bureau of Investigation. After giving instructions, to either collect the sums involved or repossess the vehicle pledged by Mr. Green, the letter went on to say:

> "Please note that customer (sic) can be contacted at the addresses below."

The addresses were given as follows:

"Randolph Green 42 Grove Road Linstead	c/o Greens General Woodwork 42A Grove Road Linstead	Paula Green c/o Singer Sewing Co. Ltd. Gransville Plaza Linstead"

It is true to say that in reporting to the bank, Global stated in its letter of May 6, 1998 that "we visited 42 Grove Road, Linstead and made discreet

enquiries of the debtor's whereabouts' (sic), but were informed that he was no longer living at that address". Global went on to say:

> "After much persuasion from us, our informant, **who advised that he is subject's brother** furnished us with a direction to the debtor's residence at Rosemount off the Linstead By Pass." (Emphasis supplied)

Global subsequently repossessed the vehicle, although the detail of that aspect was not provided. The second page of their letter, reporting to the bank, which most probably contained that information, was not exhibited with exhibit PD 10.

The end result however, is that doubt is cast on Mr. Green's credibility in attempting to deny a connection with No. 42 Grove Road. In the circumstances, although Mr. Bell was not available to attend for cross-examination, I am not convinced that Mr. Green was not served with the Writ of Summons in this matter. Consequently, he is not entitled to relief under Rule 13.2.

Rule 13.3

It now must be considered whether Mr. Green is entitled to have the judgment set aside pursuant to rule 13.3. Under this rule he must satisfy the court that his defence has a real prospect of success. The rule states 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 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 acknowledgement 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.
(Rule 26.1 (3) enables the court to attach conditions to any order)"

The explanation for failing to file an acknowledgement of service

In respect of the requirement concerning a good explanation for failing to file an appearance, it would have been gleaned from my finding made above, that Mr. Green would have failed to satisfy this condition. He has not provided an explanation for his failure to file an appearance or a defence within the appropriate time. This failure is not necessarily fatal to his application but is a factor which may be taken into account (see *MacDonald and anor. v Thorn plc.* TLR October 15, 1999, [1999] CPLR 660). I shall therefore consider the other elements of rule 13.3.

The promptness of the application to set aside

According to Mr. Green he first became aware of the judgment when his property was seized on March 10, 2006, pursuant to the order for seizure and sale. His application to set aside the judgment was filed July 11, 2006; three months later.

On the face of it, three months is too long a delay for taking this step. The question, however, is whether the application was filed as soon as was reasonably practicable. The explanation given by Mr. Green is that he

contacted his attorneys-at-law immediately after the seizure of his property. The delay in applying seems to have occurred as the attorneys-at-law sought to investigate the matter. Delay by the attorneys-at-law does not necessarily exculpate Mr. Green (see *Ken Sales & Marketing Ltd. v James & Co.* SCCA 3/2005 (delivered 20/12/05)). I am not convinced that the explanation satisfies the standard that rule 13.3 contemplates. I shall however go further.

Does the defence have a real prospect of success?

In considering whether Mr. Green's defence has a real prospect of success, I believe that I must bear in mind that the judgment in this matter was entered on March 4, 2005; almost four years ago. It is my view that a judgment creditor should not easily be deprived of his judgment after such a long period of time. To do so, would detract from the integrity of the system of the administration of justice.

I must also bear in mind that in considering the prospects of the defence, although I am not entitled to embark on a "mini trial" of the case, I am entitled to consider the likelihood of Mr. Green's assertions being accepted at a trial. I am guided by the judgment of Lord Justice Potter in *ED & F Man Liquid Products Ltd. v Patel and anor.* TLR April 17, 2003 at page 224, [2003] EWCA Civ 472 (delivered 4/4/2003). The learned Law Lord, in referring to rules 13.3 and 24.2 (the latter dealing with applications for summary judgment) stated, at paragraph 10 of his judgment:

> "It is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in *Swain v Hillman* ... However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. **In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents.** If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable..." (Emphasis supplied)

What is Mr. Green's stance? He admits, very early in his affidavit in support of this application, that he borrowed the sum of $220,000.00 from the bank, but that he defaulted after making about 6 payments. He says that he returned the vehicle to the bank (in fact it was repossessed in May 1998), and that it was never returned to him.

On that basis, he says, he cannot be held to owe the bank any sum whatsoever. That in itself cannot support a finding that there is no debt owed to the bank, as there is no indication as to the value of the vehicle as compared to the debt, after 18 months (12 of which saw no payments).

The issue of fact joined between the parties is, that the bank, through its successor, asserts that the vehicle was in fact returned to Mr. Green in September 1998. Mr. Patrick DeCarish, the representative of the bank's successor, has exhibited documents supporting the fact that the vehicle was so returned.

Admittedly, the documents do not include a receipt of the vehicle by Mr. Green. However, bearing in mind that there is documentation which

supports a return to him; the fact that the judgment has been in place for over three years; the fact that ten years have elapsed since those events took place; the fact that the bank no longer exists and its debts have been sold, I am prepared to find, and do so find, firstly, that Mr. Green's assertion is not likely to be believed at trial and secondly that it would be unfair to the bank, after the lapse of time, to have to be put to the task of proving its case.

In the circumstances, I find that Mr. Green does not have a real prospect of successfully defending the bank's claim and his application must therefore be refused.

I, therefore, make the following orders:

1. The application to set aside the default judgment is refused.

2. Costs of this application to the Claimant to be taxed if not agreed.