

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2003/HCV0390

BETWEEN	ENID COATES	CLAIMANT/RESPONDENT
A N D	XXTRA LEE SUPERMARKET LIMITED	DEFENDANT/APPLICANT

Mr. Lowel Morgan & Miss Kerry-Ann Rowe instructed by
Nunes Scholefield DeLeon & Co. for Defendant/Applicant.

Miss Sandra Johnson instructed by Sandra C. Johnson & Co. for
Claimant/Respondent.

Application to set aside final Judgment

Heard: 24th February, 2004 and 3rd March, 2004

Coram: Brooks, J.

Miss Enid Coates sustained chemical burns on December 20, 2002. Her misfortune occurred at Xxtra Lee Supermarket while she was shopping at that establishment. There she sought to purchase a liquid drain cleaner. She asserts that she was placing the product which she had taken from the supermarket's shelf, into the lower tray of her trolley, when the cover came off the container and some of the contents spilled on her forearm causing the burns.

She filed this action against Xxtra to recover damages for her injury. It did not file an acknowledgement of service. A Judgment in default of

acknowledgement of service was entered and damages were subsequently assessed against Xxtra.

Xxtra has now applied to have the judgment set aside and the service of the Claim Form and Particulars of Claim set aside.

The reasons Xxtra gives are as follows:

1. It was neither served with the Claim Form nor the Particulars of Claim, nor indeed the default judgment.
2. The judgment was therefore irregularly obtained and should not stand, and
3. It not only has a good defence to the claim but also has an ancillary claim against the manufacturer of the product.

Miss Coates through her Counsel Miss Johnson has resisted the application which is to be considered under Part 13 of the Civil Procedure Rules. Though the judgment was said to be irregularly entered, Mr. Morgan in making his submissions on behalf of Xxtra did not seek to rely on the provisions of rule 13.2. He sought to show that Xxtra was entitled to have its application granted because the provisions of rule 13.3 applied.

There is however a difficulty which may bring into operation the provisions of rule 13.2.

The Affidavit of Posting of the Claim Form, Particulars of Claim and other documents was sworn to by Pamela Saunders on the 2nd April 2003. A Review of the affidavit shows that it did not exhibit a copy of the claim form. This was in breach of rule 5.11 (2) which states:

“The affidavit must exhibit a copy of the claim form ...”
(my emphasis).

Does this failure mean that the claimant failed to prove to the Registrar service of the claim form and particulars of claim on the Defendant as is required by rule 12.4(a)?

If the answer is in the affirmative then rule 13.2 does indeed apply and Xtra is entitled to have the judgment against it set aside as of right.

My view of the rules has not revealed a stipulation as to the consequence of a failure to comply with rule 5.11 (2). I am of the view that the defect is a procedural one and it clearly could not invalidate service, as long that service had been properly effected.

Rule 26.9 (2) stipulates that an error of procedure or failure to comply with a rule “does not invalidate any steps taken in the proceedings unless the court so orders.”

I therefore view this as an instance where the court does have a discretion. Because of the view I take of Xtra’s case, (which view I shall express later in this judgment) and in light of the stage at which this action

It is clear that an error was made at the office of the Registrar of Companies. It is untenable for the defendant to submit that it must be served by post at an address which is, at best, inaccurate.

Although that argument is rejected, Xxtra has still asserted that it has not received the documents. It is deemed served by rule 5.7 but since it says that it has not received the documents informing it of the claim it would clearly have a good reason for not having filed an acknowledgement of service.

Does Xxtra have a real prospect of successfully defending the claim?

In his affidavit on behalf of Xxtra and in the proposed Draft Defence Mr. Winston Lee has sought to say that which may be summarized as follows:

1. Miss Coates failed to take reasonable care for her own safety and failed to heed the words of warning on the label of the container of the product namely.
“For institutional use only, not for resale”
2. She failed to heed the warning on the label that the product contained sulphuric acid and could cause severe burns.
3. She failed to handle the product carefully and so avoid the injury.

With labelling such as that, one wonders on what basis this product finds itself on a retail organization's shelf. But I need not tarry on that point. Mr. Morgan with commendable candour indicated that Xxtra had no witness who could speak to Miss Coates' handling of the container. Based on that admission I find that the defendant would not be able to establish any negligence or lack of care on the part of Miss Coates.

In addition there is unchallenged evidence from Miss Coates and witnesses on her behalf that:

- (a) Xxtra through a supervisor Claudia Clarke knew of the incident from the time it occurred and agreed to pay Miss Coates' medical bills, and,
- (b) Through its manager Mr. Lym, Xxtra accepted responsibility for the incident, assured Miss Coates that steps had been taken to prevent a recurrence, paid Miss Coates a sum of money representing some of her expenses, and promised to settle the remainder.

These factors convince me that Xxtra has no real prospect of successfully defending this claim and that it would be a waste of the court's

resources to set aside this judgment to allow the matter to proceed to trial on the issue of liability.

The helpful analysis of the relevant authorities by Mangatal, J. in the case of Sydney Malcolm v Metropolitan Management Transport Holdings Ltd & Anor. C.L.2002/M225 (delivered 21st May 2003) cited by Mr. Morgan convinces me that where a Defendant does not have a realistic prospect of success at a trial the judgment ought not to be set aside. Though I understand that I am not permitted, at this stage, to conduct a mini trial of the issues.

The final issue for consideration is Xxtra's contention that it has an ancillary claim which it ought to be allowed to pursue in the context of this claim. Miss Johnson on behalf of Miss Coates has submitted, and I agree, that Xxtra may pursue its claim against the manufacturer of the product, independently of this present claim.

Conclusion

Xxtra Lee Supermarket Limited though not having received the Claim Form and Particulars of Claim is deemed served with same. The default judgment was therefore properly entered. In this application Xxtra has failed to convince the court that it has a real prospect of successfully

defending this claim. The default judgment therefore ought not to be set aside.

Despite the fact that there was a defect in the affidavit of Service of Claim Form and Particulars of Claim the court will not declare the judgment in default of acknowledgment of service as invalid or irregular. The court ought, however, to ensure that the defect is cured.

The orders therefore are as follows:

1. Application to set aside the default judgment is refused.
2. The claimant is to file and serve within seven days of the date hereof a supplemental affidavit of posting of the claim form, which conforms with rule 5.11(2) of the Civil Procedure Rules 2002.
3. Costs to the claimant in the sum of \$16,000.00 which costs are to be paid before any other application may be made by the defendant.