IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

IN CHAMBERS

SUIT NO. C.L. 2002/D-034

BETWEEN	MICHELLE DALEY	1ST PLAINTIFF
A N D	SHANTELL DIGGAN (b.n.f. APLAN EVANS)	2ND PLAINTIFF
A N D	TONYO MELVIN	1ST DEFENDANT
A N D	BEVERLY STEWART	2ND DEFENDANT

Mrs. Suzette Campbell instructed by Campbell & Campbell for 1st & 2nd Defendants.

Miss Alicia Thomas instructed by K.C. Neita & Company for 1st Plaintiff.

HEARD: APRIL 23, 2003

Daye, J. (Ag.)

This is an application to set aside interlocutory judgment in default of Defence dated July 10, 2002 and for leave to file Defence out of time. The application was filed and supported by an affidavit of the 1st defendant herein on 5th November, 2002. It would therefore have been made under the **Judicature (Civil Procedure Code) Law** (C.P.C.). However, at the

time of hearing the application was agued as one to set aside default judgment under the **Civil Procedure Rules 2002** (C.P.R.).

The legal position as stated in Rule 13.4 C.P.R is that any person against whom a default judgment is entered can apply to the court to have it set aside. The specific provisions reads as follows:

> "13.4 (1) An application may be made by any person who is directly affected by the entry of judgment.
>
> (2) The application must be supported by evidence on Affidavit.
>
> (3) The affidavit must exhibit a draft of proposed Defence."

The Applicants\Defendants have satisfied the requirements of this rule.

The Court to which such application is conferred with a discretion to set aside the default judgment so long as certain pre conditions are satisfied. (Rule 13.3 C.P.R). The relevant provisions read as follows:

> "13.3 (1) Where rule 13.2 does not apply, the court may set aside a judgment entered under part 12 only if the defendant:-
>
> (a) applies to the court as soon as reasonably practicable after finding out that judgment has been entered;
>
> (a) gives a good explanation for the failure to file an acknowledgment of service or a defence as the case may be; and

(c) has a real prospect of successfully defending the claim.

Re: 13.3 (1) (a)

The interlocutory judgment in default of defence was entered on the 10th July, 2002 and the application to set it aside was filed on the 5th November, 2002. So the applicant took steps to set aside the default judgment within 3½ months of the date it was entered. In my view, this is not an unduly long time to apply to set aside a default judgment.

In addition, counsel for the Defendants submitted that they did not find out that judgment had been entered until September 2002. Whereupon the defendants entered an appearance and filed the application to set it aside and sought leave to file a defence out of time.

It was submitted, that the applicant took steps to set aside the default judgment within one month of being notified if its entry. I agree that time should begin to run against the defendants from the date of service of the judgment in September 2002 and not from 10th July, 2002 when the judgment was entered. In all the circumstances, I find that the Applicants/Defendants acted "as soon as reasonably practicable after finding out that judgment had been entered." Therefore requirements of rule 13.3 (1) (a) have been satisfied.

Re: 13.3 (1) (b)

The defendants proffered an explanation for the failure to file a defence within time. This is contained in his affidavit in support of the application dated November 5, 2002. The relevant paragraphs read as follows:

> "11. That on the 24th May, 2002 the suit herein was filed on behalf of the Plaintiffs to recover compensation for injuries they suffered.
>
> 12. That the documents were subsequently served on me and I took them to my insurers, United General Insurance Company Limited who advised that they would assume conduct of the matters on my behalf.
>
> 13. That I was recently advised by the said insurers that Interlocutory Judgment was entered against me before the accident was fully investigated and a determination made to file a defence herein."

The question arises whether this is a good explanation for not filing a defence in time. This explanation seeks to cast blame on the insurer. The insurer is the agent for the defendants. In this regard, the insurer's cannot be separated from the defendant's conduct. Therefore the delay cannot be justified by blaming the insurer. Accordingly, in my view the defendants has not satisfied Rule 13.3 (1) (b).

However, this does not dispose of the application to set aside the default judgment. There is the other consideration of Rule 13.3 (1) (c)

which is probably the most crucial one. This is whether the defendants have a real prospect of successfully defending the claim.

Re: Rule 13.3 (1) (c)

In order to deal with the requirement of this rule I find it necessary to look at, but not determine finally the merits of, the proposed Defence. In essence, the defendants deny that it was their negligence that caused the motor vehicle accident which resulted in injuries to the plaintiffs who were passengers in their car. They allege, that the plaintiffs caused the injuries to themselves or contributed to their injuries by their own negligence by not wearing their seat belts. In other words, the defendants are raising the issue of contributory negligence which is a defence to the tort of negligence. In addition the 1st defendant deponed in his affidavit at paragraphs 4, 5, 8 and 9 as follows:-

> "4. That I was driving along Mount Rosser Road from the direction of Ocho Rios at about 50 km. per hour. On approaching a sharp corner along the roadway I lost control of the car which turned over in a gully.
>
> 5. That after the accident I looked around the vehicle to ensure that my friends were okay but could only find the front seat passenger who was still belted in her seat.
>
> 8. That at the time of the accident the 1st Plaintiff was not wearing her seat belt.....neither was the 2nd Plaintiff placed in a car seat or fitted with a seat belt.

9. That I verily believe if they had been wearing the seat belts they would not have been thrown from the vehicle or as seriously injured as they were."

I accept the principle that a judge on an application at the interlocutory stage should be "wary to resolve issues of fact on affidavit evidence....." Although the 1st defendant's affidavit seeks to raise issue of fact, these facts lean towards the quantum of damages rather than liability. It seems that the defendants are seeking to reduce the possible damages that might be assessed against them by attacking liability. This is my view as to the prospects of success of the proposed defence at trial. The evidence in support of the proposed defence in my view does not carry with it a degree of conviction on the issue of liability.

I apply the interpretation of the word "**real**" in the phrase "**real prospect"** of successfully defending the claim in **Swain v. Hillman** [2001] 1All ER 91 which held the word connotes a realistic as opposed to a fanciful prospect of success. Under rule 13.3 of the C.P.R. 20092 the defendant is required to have a case that is better that merely arguable. **(See E.D and Fman Liquid Products Limited v. Patel and Anor.,** Times 18th April, 2003. In other words, the threshold for setting aside default judgments is higher under the rules of the C.P.R. that the C.P.C.

Without conducting a mini trial I am of the view that it is contradictory for the 1st defendant to assert in his affidavits that he lost control of the motor vehicle in which the plaintiffs were passengers, and to say at the same time that it was the plaintiffs who caused the injuries to themselves either wholly or in part. In my view, the applicants' defence does not have a real prospect of success on the issue of liability. The applicant has not satisfied **Rule 13.3 (1) (c)**

Accordingly, I dismissed the application to set aside the interlocutory judgment and for leave to file defence out of time.