[2018] **JMSC Civ 181**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2017HCV00216

BETWEEN	**RELECSIA GORDON**	**CLAIMANT**
AND	**KENNARDO ROBINSON**	**1ST DEFENDANT**
AND	**KEITA YALANDA KELLY-LAMEY**	**2ND DEFENDANT**

IN CHAMBERS

Mr Philmore Scott instructed by Philmore H. Scott & Associates for the Claimant/Respondent

Ms Claudine Stewart instructed by Burton-Campbell & Associates for the Applicant/Defendant

Heard October 26, 2017 and September 21, 2018

Rule 13.3 of the Civil Procedure Rules (CPR) as amended [2006] – Application to Set Aside Default Judgment

MASTER MASON

[1] Facts

On or around January 15, 2013 at about 8:45a.m. the Claimant Relecsia Gordon was standing behind a parked disabled coaster bus along the Granville Main Road in the parish of Trelawny, when a beige Toyota Corolla motor car registered 4292 FT and driven by the 1st Defendant Kennardo Robinson and

owned by the 2nd Defendant lost control and proceeded to hit the Claimant and finally collided with the coaster bus. As a result of the collision the Claimant has suffered multiple and serious injuries, loss and incurred expenses.

[2] Chronology of Events are as follows:

(1) The incident involving the 1st Defendant and the Claimant occurred on January 15, 2013.

(2) The Claim Form and Particulars of Claim were filed in the Supreme Court on January 25, 2017 after unsuccessful settlement discussions.

(3) Notice of Proceedings and a copy of Claim Form and Particulars of Claim were served on the Defendant's insurers Advantage General Insurance Company Limited on January 25, 2017.

(4) The Pleadings were served on the 1st and 2nd Defendants personally on March 17, 2017.

(5) Mr. Keith Brown, Assistant Bailiff for Trelawny filed an Affidavit of Service on April 12, 2017 evidencing personal service on the Defendants.

(6) The Claimant filed an Application for Default Judgment for Failure by the 1st Defendant to file an Acknowledgment of Service on April 26, 2017.

(7) Default Judgment was perfected and entered in Judgment Book 767 Folio 150 on July 10, 2017.

(8) The Defendants filed a Notice of Application to Set Aside Default Judgment on June 28, 2017.

(9) The Defendants filed an Affidavit in Support of the Application to Set Aside Default Judgment on September 26, 2017.

[3] The Defendants/Applicants Kennardo Robinson and Keita Kelly-Lamey filed a Notice of Application for Court Orders on June 28, 2017 seeking the following Orders:

(1) That permission be granted to the Applicants to be heard in the Claim.

(2) That the Acknowledgment of Service filed on behalf of the Defendants be permitted to stand.

(3) That the Default Judgment entered on April 26, 2017 against the Defendants be set aside.

(4) That all proceedings flowing from the Default Judgment be stayed pending the outcome of this application.

(5) That the Defendants be allowed 14 days from the date of the hearing of this application to file a Defence.

(6) Such further and other relief as this Honourable Court deems fit.

[4] **The Law**

The power of the Court to Set Aside a Default Judgment regularly obtained is found in Part 13 Rule 13.3 of the CPR as amended in 2006. The relevant provisions are 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 reasonably practicable after finding out that judgment has been entered.

(b) Given a good explanation for the failure to file an Acknowledgment 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.

[5] **Is There a Defence with a Real Prospect of Success?**

The primary consideration for setting aside a Default Judgment regularly obtained is whether the Defendants have a real prospect of successfully defending the Claim as opposed to a fanciful prospect of success. According to Sykes, J at paragraph 22 of his judgment in **Sasha Gaye Saunders v Michael Green et al** Claim No. 2006HCV02868**:**

> *"The test of real prospect of successfully defending the claim is higher than the test of an arguable Defence."*

See the case of **ED&F Man Liquid Products v Patel & ANRF** [2003] C.P. Rep 51 in which it was held:

> *"Real prospect of success test is the same that is applicable to Summary Judgments. It does not mean some prospect. Real prospect is not blind or misguided exuberance. It is open to the Court, where available, to look at contemporaneous documents and other material to see if the prospect is real."*

[6] It is submitted that in evaluating whether the test has been satisfied, there must be exhibited to the Affidavit of merit, a Defence which meets the requirements of part 10 of the CPR. The draft Defence must reflect the facts on which the Defendants are seeking to rely as set out in evidence.

[7] In the case of **Furnival v Brooke** [1883] it was said that where the judgment is regular the Court has a discretion in the matter and the Defendant, as a rule, must show by Affidavit that they have a defence to the action on the merits. **Stuart Sime in his text, A Practical Approach to Civil Procedure, 6th edition, p. 248** noted that the written evidence in support of the application to set aside will have to address, in particular, the alleged defence on the merit, the reason

for not responding to the claim in time, and the explanation for any delay in making the application to set aside. This is in keeping with the prerequisites that must be satisfied pursuant to the rules.

[8] Further, according to Craig Osbourn, Civil Litigation Practice Guides 2005-2006, p. 364, the Defendant must file evidence to persuade the Court that there are serious issues, which provide a real prospect of him successfully defending the Claim. The evidence filed must set out the case in sufficient detail to satisfy the test.

[9] The law is clear the affidavit must contain the facts being relied on and that the draft defence should be exhibited. In **Evans v Bartlam** [1937] A.C 473, it was said that before a judgment regularly obtained could be set aside an Affidavit of Merit was required and when the application is not so supported it ought not to be granted except for some sufficient cause shown.

[10] It is noted that the aforementioned authorities demonstrate that there must be an Affidavit of Merit and a Defence which provide the Court with sufficient evidence to persuade that there is a real prospect of a Defendant successfully defending the Claim. However, in exercising the discretion whether or not to set aside a judgment regularly obtained, the Court must also consider the matters set out in rule 13.3(2).

The Affidavit Evidence and Defence

[11] It is necessary to examine the affidavit evidence of the Defendant and the proposed Defence. The Affidavit and Defence were filed on September 26, 2017. The 2nd Defendant is relying on the evidence of the 1st Defendant as he is the one who can speak positively to the facts in the matter. There is no dispute that the accident occurred on a bright day, early in the morning and that the car driven by the 1st Defendant collided with the Claimant at the back of the bus. The 1st Defendant insists that he was travelling within the speed limit.

[12] The 1st Defendant avers at paragraph 4 of his Defence that "he was driving around a corner along the roadway and had almost completed it when he came upon the Claimant who was standing in the roadway behind a bus directly in the path of the motor car, that he immediately brake to avoid an accident but could not do so and the car collided with the pedestrian at the back of the bus". This is consistent with his description at paragraph 4 of his Affidavit where he states that "I had just gone around a bend in the road when I came upon a Toyota coaster motor bus which was stationary directly in the path of my motor car in the left lane".

[13] The Claimant, however, is denying this version. At paragraph 4 of her Affidavit she denies that the 1st Defendant was travelling around a corner when the collision took place and that he could not see me around the corner or that he had no knowledge nor was given any warning of her presence in the roadway. She goes further to say at paragraph 5 "that the coaster bus in which I was travelling had just passed a bus stop which is at a corner along the Green Pond main road in the parish of Trelawny, and that after exiting the corner the coaster bus develop a flat tyre while travelling on a straight stretch of the road and had to stop."

[14] The question that would arise is whose version is correct and whether the accident did in fact occur around a corner? To my mind, this is an issue to be properly addressed at trial where the evidence can be determined by a trial judge. The Claimant at paragraph 7 of her Affidavit seeks to rely on the police report to show that the accident did not take place around a corner as is alluded to by the 1st Defendant.

[15] At paragraph 11 of her Affidavit, the Claimant avers that the 1st Defendant could not miss seeing the big coaster bus and if the Toyota Corolla had not crashed into the rear of the bus she would have suffered more severe injuries or could have probably died. This raises the issue of negligence and the duty of care a driver of a vehicle owes to other road users. The Claimant in his Submissions

made reference to the case of **Jowayne Clarke (by his next friend Anthony Clarke) and Anthony Clarke v Daniel Jankine** Suit No. 2001CLC00211 at page 14 (3rd paragraph to showcase the duty on the driver of a vehicle. It was held by Thompson, J that:

> *"A driver of a vehicle owes a duty to take proper care and not to cause damage to other road users when he reasonably foresees is likely to be affected by his driving. In order to satisfy this duty he should keep a proper look out, avoid excessive speed and observe traffic rules and regulations."*

[16] The Claimant on that premise is of the view that the 1st Defendant did not discharge his duty of care owed to other road users and as such submits that the Defence filed has not reached the threshold required. In my view, it is sufficient to say that the question of negligence and the degree thereof will weigh heavily on the evidence produced at the trial.

[17] The Claimant states at paragraph 6 of her affidavit that all the passengers including herself had to exit the bus on the straight stretch of road. There was no sidewalk along the roadway, the only option was to stand at the front of the bus or at the back of the bus, or the other only option was to go into the over grown bush on the left side of the road. But, the Claimant chose to stand at the back of the bus, on the road way, rather than at the front with the other passengers.

[18] The 1st Defendant on the other hand avers at paragraph 4 of the Defence that he came upon the Claimant who was standing in the roadway behind a bus directly in the path of the roadway. He further states at paragraph 5 of the Defence that the accident was caused and or contributed by the negligence of the Claimant who stood in the roadway in the vicinity of a corner where she was not visible to approaching motorist.

[19] It is evident that a collision occurred and that the Claimant was injured. Clearly there are credible issues to be tried, there are disputes as to whether the Claimant was standing in the roadway in the vicinity of a corner, the issue of whether the accident occurred on the straight or in a corner or whether the

Claimant is contributorily negligent or whether the Defendant is totally responsible for the accident. Suffice it to say the issues of fact and law can be ventilated at trial.

[20] Therefore, based on the issue of contributory negligence and Particulars of Claim of negligence raised by the Defendant in their defence, I am of the view that there is some prospect of the Defendants successfully defending this claim.

Whether the application to Set Aside was properly grounded?

[21] The Claimant also took issue with whether or not the application to set aside was properly grounded on condition that the Notice of Application to Set Aside was not supported with affidavit evidence. The Affidavit in Support was filed on or about three (3) months after the Notice. Reference was made to rule 13.4 of the CPR which provides under the heading Applications to Vary or Set Aside Judgment Procedure – It states:

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 the proposed defence.

[22] It is noted that the application to Set Aside Default Judgment was filed on June 28, 2017 and the Affidavit grounding the application was filed three (3) months later on September 26, 2017. The Claimant submits that the Affidavit is in contravention of the rules particularly 13.4(2) and that there is no valid application to set aside the Default Judgment and consequently, the court has no jurisdiction to consider whether the Defendants had established a real prospect of successfully defending the claim.

[23] The Claimant in her submissions is relying on the Court of Appeal decision of **Dorothy Vendryes v Dr. Richard Keane and Karene Keane** [2011] JMCA Civ

15 where Harris JA at paragraph 10 considered Rule 8.16(1) and interpreted the meaning of the word 'must' within the context of the CPR.

[24] At paragraph 12 Harris J.A. ruled that:

> *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 unqualified duty to adhere to its conformity. Failure to comply with the rules 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.*

[25] In the Dorothy Vendryes case (Supra) the Claimant had only served the Claim Form and Particulars of Claim on the Defendant. The other documents required to be served by rule 8.16(1) of the CPR were not served. Upon the failure of the Defendant to file an Acknowledgment of Service, the Claimant proceeded to request judgment in default of Acknowledgement of Service which was entered. At first instance, Sykes, J ruled that the judgment was irregularly obtained, due to non-compliance with CPR 8.16(1) and as such, it had to be set aside as of right.

[26] The Claimant in his submissions is of the opinion that rule 13.4 of the CPR must be strictly complied with and that the application must be accompanied by an Affidavit in Support. Hence, the Claimant is submitting that the application to set aside the Default Judgment in the instant case has not been properly grounded in accordance with rule 13.4 where compliance is mandatory.

[27] In the Dorothy Vendryes case, I support the decision that non-compliance with rule 8.16(1) of the CPR warranted the setting aside of the Default Judgment which was irregularly obtained.

[28] Rules 8.16(1) states in part:

> When a claim form is served on a Defendant it must be accompanied by:
>
> (a) A form of Acknowledge of Service (form 3 or 4);

(b) A form of Defence (form 5);

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

(d) …….

(e) ……

[29] However, I am of the view that the sanction for non-compliance with rule 13.4 of the CPR does not amount to setting aside of the Default Judgment, as is submitted by the Claimant. In the instant case, the Affidavit in Support was filed some three months after the Notice of Application for Court orders was filed. To my mind, it is a procedural misstep deemed an irregularity which can be cured.

[30] According to McDonald Bishop J (as she then was) in the case of **Joseph Nanco v Anthony Lugg and B&J Equipment Rental Limited** 2009HCV03449 at paragraphs 29 and 30 states

> *29.* I have duly considered the entire submissions made by both counsel on the question as to whether the judgment was irregularly obtained. It is clear on a reading of rule 12.5 that there is no express requirement that for default judgment to be entered there must be proof of service of any of the documents specified in rule 8.16(1). The only documents mentioned expressly are the claim form and particulars of claim.
>
> 30. Similarly, rule 13.2 that allows for judgment in default to be set aside as of right has made no reference to the documents specified in rule 8.16(1) by saying failure to serve such documents would render the default judgment obtained irregular. Similarly, rule 8.16(1) that provides for the mandatory service of these documents has not specify the consequences for failure to comply with that rule. So when one consider all the operable rules, there is nothing to say explicitly that failure to serve the documents specified in rule 8.16(1) would affect a default judgment entered on the basis of a claim served without them.

[31] In the case of **Joseph Nanco**, the Claimant had failed to serve with the Claim Form, the prescribed notes for the Defendant (Form 1A or 2A) and a form of Defence (Forms). In that case, reliance was placed on the judgment of the Court of Appeal in Dorothy Vendryes case which the court viewed as distinguishable.

Consequently, I am of the view that late filing and service of the Affidavit in Support of the Notice of Application is a procedural misstep which can be corrected by invoking rule 26.9 which provides that a breach of a rule does not, in all cases invalidate any steps taken in the proceedings unless the court so orders.

[32] McDonald Bishop J went on to say at paragraph 31

> "It should be noted within this context, however, that rule 26.9 applies where consequence of failure to comply with, inter alia, a rule has not been specified. Rule 26.9(2) then provides, among other things, that failure to comply with a rule does not invalidate any step taken in the proceedings, "unless the Court so orders". It means that the effect on the proceedings of the Claimant's failure to comply with rule 8.16(1) does not, without more, invalidate the proceedings. Whether it should do so, is ultimately, a question for the court to determine in the circumstances of the case."

According to rule 26.9(4) the Court may make such an Order on or without an application by a party.

[33] Therefore, I am of the view, that rule 13.4 like many other rules in the CPR is silent on any consequence that should flow from failure to comply with a rule. As such, I am invoking my powers under rule 26.9 to correct the irregularity that has been rendered by the Defendants non-compliance with rule 13.4(2), resulting in the late filing of the Affidavit in Support of Application to Set Aside Default Judgment. By doing so, the objectives would have been met, and in this regard, there is no prejudice to be suffered by the Claimant.

Has the Defendants applied to the Court as soon as was reasonably practicable after finding out that the Judgment was entered?

[34] The application to set aside the Default Judgment was filed on June 28, 2017. The Default Judgment was entered on April 26, 2017. The 1st Defendant explained at paragraph 8 of his Affidavit that he was served with court papers which he took to the Montego Bay branch of his insurance company. At paragraph 11 of his affidavit, he depones that on or about June 23, 2017, he met

with Attorneys-at-Law retained by the insurance company to represent him. It was some two (2) months after judgment was entered that the application for Default Judgment was made. In the scheme of things, I do not think that the delay in applying to set aside the Default Judgment was inordinate.

Is there a good explanation for failure to file An Acknowledgment of Service and Defence?

[35] The 1st Defendant having been served on March 17, 2017 fails to indicate when he took the "court papers" to the insurance company. It is noted, however, that the 1st Defendant neglected and or omitted to check with the insurance company on the progress of the matter or to prompt them to act. It would appear that the responsibility to comply with the court procedures was left entirely up to the insurance company by the 1st Defendant. According to Sykes, J in Sasha Gaye Saunders at paragraph 10, "Mr. Hart is seeking to absolve himself of any responsibility by placing all the blame on N.E.M." There is no evidence or indication that the 1st Defendant took time to read the court documents, if he had, he would have realised that he had a responsibility to file an Acknowledgment of Service and Defence within a particular time.

[36] It is also noted that the insurance company was aware of the proceedings from as early as January 25, 2017 when a Notice of Proceedings and a courtesy copy of the Claim Form and Particulars of Claim were served on the company on behalf of the Defendants, despite being served early with the pleadings.

[37] The 1st Defendant at paragraph 13 of his Affidavit states that "having contacted the insurer of the car I verily believe that there was a delay in giving instructions for a Defence to be filed on my behalf as the documents I submitted to them was sent from the Montego Bay branch to the Company's Legal Department in Kingston. The Claimant's file was retrieved and reviewed along with the documents I had submitted before proper instructions could be given for a Defence of the claim. I was informed and verily believe that this was done within

the time limited for filing my Defence due to the number of claims being handled by the insurer."

[38] To my mind, the explanation proffered by the 1st Defendant goes against the account stated in the earlier paragraph. The insurance company was aware of the claim. The reasons advanced by the 1st Defendant for not filing an Acknowledgment of Service and a Defence in the prescribed time are very poor and inexcusable. Essentially, the blame for the tardiness is being placed squarely on the insurance company. Defendants always find it easier to blame the insurance company for their inadvertence.

[39] In **Anwar Wright v Attorney General of Jamaica** 2009HCV04340 at paragraphs 23 and 24 Master Simmons (as she then was) had to consider the explanation for the delay in filing an Acknowledgment of Service which was stated as inadvertence on the part of Counsel in the Attorney General's office. Master Simmons referred to the case Ken Sales & Marketing Limited v James & Company [A Firm] Supreme Court Civil Appeal No. 3/05 delivered on 20th December 2005. She noted that the delay in that case was approximately one month due to "inadvertence and certain procedural problems in the Attorney General's office." Master Simmons stated that the Court of Appeal held that the reason advanced was not a good explanation for failure to file on time.

[40] Although I am not impressed with the reasons offered by the 1st Defendant for not filing an Acknowledgment of Service and Defence within the time prescribed by the rules, in the scheme of things, the proceedings were not protracted. The Attorneys-at-Law for the Defendants acted quickly upon receipt of instructions and filed the application to Set Aside the Default Judgment within days of being retained.

[41] In conclusion, therefore, I think that there are triable issues to be determined. The Defendants have a real prospect of defending the claim and would likely suffer an injustice if the judgment is not set aside.

[42] In view of the overriding objectives of enabling the Court to deal with cases justly by ensuring so far as practicable that the parties are on equal footing, and are not prejudiced by their financial position; and, ensuring that cases are dealt with expeditiously and fairly. Therefore, in the interest of the overriding objectives I would urge the parties to proceed to mediation, so that the issues can be ventilated with a possibility of having the matter settled thereby saving time awaiting a trial and minimising any perceived prejudice that might be occasioned by either party.

[43] I therefore order as follows:

1. Permission is granted to allow the Affidavits of the Defendants filed on September 26, 2017 in support of Application to Set Aside Default Judgment to stand as if filed with the Notice of Application for Court Orders.

2. That the Acknowledgment of Service filed by the Defendant on June 28, 2017 is permitted to stand.

3. The Defendants are permitted to file a Defence within 7 days of today's date.

4. The Default Judgment entered on April 26, 2017 is set aside.

5. The parties are to proceed to mediation within 90 days of today's date.

6. Costs to the Claimant to be agreed or taxed.

7. The Applicant/Defendant's Attorney-at-Law to prepare file and serve the Order made herein.