



[2023] JMSC Civ 244

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV 01700

BETWEEN	COURTNEY HARRIS	CLAIMANT
AND	PATRICIA O. NEWLAND	1ST DEFENDANT
AND	JIM HOSANG	2ND DEFENDANT

IN CHAMBERS

**Michelle Ann Cousins and Stephen McCreath instructed by Zavia Mayne & Co.
for the claimant**

**Jamila Maitland and Anthony Armstrong instructed by Campbell McDermott for
the defendant**

HEARD: 2 & 3 MARCH, 22 MAY, 9 OCTOBER & 15 DECEMBER 2023

**Civil Procedure Rules – rule 13.2 - Application to set aside default judgment –
whether defendants were served – whether default judgment should be set aside
as of right**

MASTER C. THOMAS

Introduction

[1] The instant application to set aside default judgment arose from an accident which occurred on 24 December 2014. On that day, the 2nd defendant was driving the 1st defendant’s motor vehicle registered 2644 EY along the Drax Hall main road in the parish of St Ann when a collision occurred between the 1st defendant’s motor vehicle and the claimant’s pedal cycle, as a result of which the claimant sustained injuries.

[2] On 27 April 2016, claim form with prescribed accompanying documents and particulars of claim (“originating documents”) were filed and on 28 June 2016,

judgment in default of acknowledgement of service was entered against both defendants. Service of the originating documents was proven by an affidavit of service sworn to by Andrew Scott filed on 23 June 2016. In that affidavit, Mr Scott deponed that on 13 May 2016 at 5:29 pm, he served a true copy of the originating documents on Patricia O Newland at Steer Town in the parish of St Ann. Ms Newland, he deponed, was known to live at this location and was not previously known to him but when he visited the “given address” she admitted that she was the 1st defendant and accepted service of the documents when he handed them to her.

- [3] Mr Scott also deponed that on 13 May 2016 at 5:29 pm, he served the 2nd defendant at Hollywood District, Steer Town in the parish of St Ann. As was the case with the 1st defendant, Mr Scott stated that the 2nd defendant was known to live at this location and that the 2nd defendant was not previously known to him but when he visited the “given address”, the 2nd defendant admitted that he was the 2nd defendant and accepted service of the documents.
- [4] On 7 June 2018, following an assessment of damages hearing, final judgment in the amount of \$2,400,000.00 for general damages and \$25,430.00 for special damages plus interest was entered against both defendants and on 9 September 2019, an order for seizure and sale was filed. Service of the default judgment, witness statements and all other documents pertaining to the assessment of damages was proved by the affidavits of Paul Wong and Steevie Smith.
- [5] On 11 April 2019, the defendants filed the instant application seeking, inter alia, to set aside the interlocutory judgment, the final judgment and all proceedings flowing therefrom as well as a stay of execution of the final judgment. The substantive grounds relied on in support of the application are that:
- (i) the defendants were not served with the claim form and the particulars of claim;
 - (ii) the defendants were not served with the interlocutory judgment in default and the notice of assessment;

- (iii) the fact that the defendants were not served with the aforesaid documents was not brought to the court's attention at any time in the proceedings.

- [6] The application was supported by three affidavits filed on 13 January 2021: affidavit of Harrington McDermott, affidavit of Petrena O Newland and affidavit of Jim Hosang.

- [7] Mr McDermott, among other things, stated that his firm was instructed by Advantage General Insurance ("AGI") that on 2 May 2016, AGI was served with a notice of proceedings which had been filed on 27 April 2016 and that the next time AGI heard anything further regarding the claim was on 27 June 2018 when it was served with final judgment which had been filed on 22 June 2018. It took some time for AGI to contact the 1st defendant as when the telephone number on file for the insured was called, the automated message was that it was unassigned. Mr McDermott further deponed that upon ultimately being able to contact the 1st defendant, she advised that she had not been served with any legal documents in this matter and that she did not believe that the 2nd defendant, who was her husband and the authorised driver at the time of the alleged incident, was served with any documents as he resides in Canada and was not in Jamaica in 2016 or 2017 but had travelled to Jamaica in January of 2018 and had spent approximately 3 weeks. Mr McDermott also deponed that in March 2019, he received a telephone number for the 2nd defendant in Ontario, Canada and during the telephone conversation, the 2nd defendant informed him that he was not served with any documents in this matter and "corroborated the information" that the 1st defendant had previously given about his travel history.

- [8] Aside from giving their account of how the accident transpired, the essence of the defendants' evidence is that they were not served with any documents in this claim. The 1st defendant, who deponed that her name is Petrena Newland, stated "categorically that [she] was not served with any documents by Andrew Scott or anyone else for that matter". She referred to the affidavit of Mr Scott where she was referred to as Patricia Newland and stated that had she been approached and referred to as Patricia Newland by anyone, she would not have acknowledged that person. Furthermore, she deponed, at the time Mr Scott

alleged to have served the documents on her, she would have been at her place of business which is located at 3 Main Street, St Ann's Bay as it is the norm for her to be at her place of business from 8:00 am to 8:00 pm, Mondays to Saturdays. She also stated that she had never met Mr Steevie Smith or Mr Paul Wong. She also gave evidence in relation to the 2nd defendant's whereabouts at the time Mr Scott alleged that he had served the 2nd defendant. She stated that the 2nd defendant is a Canadian citizen residing in Canada and that he has never resided at Steer Town and that whenever he is in Jamaica he stays at Vista Del Mar in St Ann or Savoy Crescent in Manchester. She stated that prior to January 2018, the last time that the 2nd defendant had visited Jamaica was in 2015 for his mother's funeral. At the time of the alleged service by Mr Scott, the 2nd defendant was not in Jamaica. Copies of the 2nd defendant's Canadian passport were exhibited.

- [9] The 2nd defendant, among other things, deponed that after the day on which the accident occurred, in January of the following year, he departed Jamaica and returned home to Canada. He heard nothing further about the accident until he was called sometime in March or April 2019 by Mr Harrington McDermott informing him that the claim had been brought against him and that a final judgment had been entered against him and the 1st defendant and that AGI was now required to pay in excess of \$2,400,000.00. He deponed that not only was he not in Jamaica on any of the three occasions on which Mr Scott, Mr Wong and Mr Smith had allegedly served him, he does not reside at Steer Town and never has. He stated that the 1st defendant resides at Steer Town with their daughter and that whenever he visits Jamaica, he would pick up his daughter and she would stay with him at Vista Del Mar as he and the 1st defendant are separated and do not have a good relationship. He exhibited a copy of "the official correspondence received from the Passport Immigration and Citizenship Agency [showing [his] travel history from 2014". This document was written under the signature of one Ezra Whittock, Acting Director of Immigration Services and was a letter addressed to the defendants' attorneys-at-law to which was attached the 2nd defendant's travel history "as taken from the Jamaica Border Management System -enTRex". He stated that had he been

served with any legal documents; he would have taken them to the insurance company as he does not believe that he was at fault in the collision.

- [10]** On 15 April 2021, Mr Scott swore to an affidavit in response to the application to set aside the default judgment in which he deponed that he received instructions to serve the originating documents on both defendants, “both of Steer Town and particularly in the Hollywood district in the parish of St Ann”. He deponed that on 13 May 2016 upon arriving at the “abovementioned address”, he made further enquiries as the defendants were not previously known to him. He stated that he had read the 1st defendant’s affidavit where she had denied being served, and that when he enquired of her as to whether she was Patricia Newland, she acknowledged that her surname is Newland and that her proper name is Petrena Newland. He then presented the documents to her and told her it was regarding a motor vehicle accident. She did not appear surprised and willingly accepted same. He described her as appearing to be in her forties, of dark complexion and approximately 5 feet 6 inches.
- [11]** Mr Scott also deponed that he saw a man who was of “medium built, [and] appeared to be in his late forties. He had facial hair and was of light complexion.” He asked the man if his name was Jim Hosang and he said “Yes”. The man admitted knowing about the incident and willingly accepted the documents. He also stated that he had been a process server for some time now” and took his profession seriously. He did not have any personal relations with the defendants and so would have no reasons at all to provide false information to his employer about serving them with his firm’s documents.
- [12]** As the accounts of the defendants, on the one hand, and that of Mr Scott, on the other hand, were diametrically opposed, these affiants were subject to cross-examination. Mr Steevie Smith could not be located so he was not subject to cross-examination. Orders were made for Mr Paul Wong to be cross-examined as well but he failed to attend court despite given the opportunity to do so on a number of occasions.
- [13]** Under cross-examination, Mr Scott was asked the reason he had not stated in his first affidavit that the 1st defendant had identified herself as Petrena. He responded as follows:

“In the first affidavit, I go with the instructions of the attorney for whatever the name was for what I did. I go with the attorney what the name from what I did and maybe not saying she is Petrena. I think it’s a matter of taking it up with the attorney.

He did not provide any further explanation but insisted that he had served the 1st defendant and at the time she had said that her name is Petrena. The following exchange then occurred:

Q: Did you tell the lawyer that her name is Petrena?

A: Yes.

Q: Even though you told the lawyer you still went ahead and signed with it as ‘Patricia Newland’?

A: Yes.

Q: Did you read the first affidavit dated June 13, 2016 prior to signing it?

A: Yes

Q: And you signed it to say you served Patricia

A: Yes.

He agreed that the first time he mentioned that the 1st defendant had identified herself as Petrena was in his second affidavit but denied that it was because the 1st defendant had filed her affidavit and he had read the affidavit, that that was “how [he] knew her name to be Petrena Newland”. He again asserted that he served the 1st defendant and that she had said her name was Petrena and stated that “the attorney has to deal with that situation”.

[14] Mr Scott was also asked if he had a book with all the records of service and he answered in the affirmative. The following exchange then occurred:

Q: And you would have written in that document about serving Mr Hosang and Ms Petrena Newland?

A: Yes, I have records.

Q: And at the time when you were giving instructions for the April 2021 affidavit, did you refresh your memory?

Q: No, I did not. I signed the affidavit that the attorney prepared for any correction to be made.

Q: Do you recall what you did that morning before serving Petrena and Jim on 13 May 2016?

A: I don't quite remember.

Q: Do you remember what you did after you served?

A: If I serve the clients, I leave.

Q: What did you do after you served them?

A: I can't recall.

Q: Based on the evidence, when you were preparing the 2021 affidavit, you did not refresh your memory but you cannot recall what you did on the morning of 13 May 2016 and you don't recall what you did in the evening?

A: Yes, I can't recall what I did after.

Q: But you would have the court believe that you remember serving Ms Petrena Newland?

A: Sure

When it was put to Mr Scott that the 2nd defendant had been in Canada at the time of the alleged service, he stated he was not in a position to claim that the 2nd defendant was in Canada at that time.

[15] It was also put to Mr Scott that it was when he had seen the affidavit of the 1st defendant which exhibited the pages of the 2nd defendant's passport containing the 2nd defendant's picture that he became aware of the "likeness" of the 2nd defendant. He denied seeing the picture of the 2nd defendant which was included in the exhibited pages of the 2nd defendant's passport. When it was put to him that he had stated in his affidavit that he had read the affidavit of the 1st defendant, he again denied that he had seen the picture.

- [16] The 2nd defendant gave evidence under cross-examination that he had never seen Mr Scott in all his life. The first time he was seeing Mr Scott was when Mr Scott was giving evidence in court. The first time he became aware of the claim was when he received an email from the lawyer representing the insurance company. He was questioned about information contained in the document from PICA, which is set out below:

<u>HOSANG</u>	JIM JUNIOR	18/01/1980	Canada	Montego Bay Airport	12/10/2020 13:32	Admit
<u>HOSANG</u>	JIM JUNIOR	18/01/1980	Canada	Montego Bay Airport	27/02/2019 17:13	Allow to Exit
<u>HOSANG</u>	JIM JUNIOR	18/01/1980	Canada	Montego Bay Airport	03/05/2018 12:56	Allow to Exit
<u>HOSANG</u>	JIM JUNIOR	18/01/1980	Canada	Montego Bay Airport	04/01/2018 13:24	Admit

He was asked to explain why it was recorded that he had exited Jamaica on 3 May 2018 and again on 27 February 2019 without there being any indication on what date he entered Jamaica after he exited on 3 May 2018. His response was that he was unable to provide an explanation as he was not the one who had printed the document. When it was further put to him that the document was inaccurate, he stated:

I think this document is from the government of Jamaica and so if the document is not accurate, then it could be said that the government is not accurate. I do not know how to explain it.

In re-examination, the 2nd defendant gave evidence that he was issued a Jamaican passport in or around when he was 15 years of age and that he had never renewed the Jamaican passport nor had he ever used it since he received the Canadian passport. He also stated that he had never travelled on the expired passport. He also stated that he had received no passport other than the Jamaican and the Canadian passports.

- [17] In cross-examination, among other things, the 1st defendant was questioned in relation to her evidence that on Mondays to Saturdays she was always at her workplace between 8:00 am and 8:00 pm. It was put to her that there were times that she would have to leave her workplace earlier to attend to certain responsibilities. She denied this and asserted that she was always at her

workplace on those days and at those times, sometimes even later. She stated that she never left before 8:00 pm. She also stated that she would always leave at 8:00 am because she had to take her daughter to school. When it was put to her that prior to Mr Scott serving her with the documents he had called her "Patricia Newland" and she had corrected him, she denied this and further asserted that she would not accept somebody else's mail. She also stated that if the 2nd defendant was served, it was not while he was with her.

Submissions

- [18] Although the parties were ordered to file written submissions with authorities, none were submitted on behalf of the claimant. It was submitted on behalf of the defendant that the cases where the court must set aside or vary a default judgment are set out in rules 13.2(1) of the Civil Procedure Rules ("CPR"). Relying on **Kingston Telecom Ltd v Dahari** 2003 HCV 02433, it was submitted that the power given to the court under rule 13.2 is not discretionary. Reference was also made to rules 39.5 and 39.6 concerning entering judgment in the absence of a defendant and applying to set aside the judgment respectively.
- [19] In relation to the evidence given, it was submitted with respect to the 1st defendant that upon an assessment of the totality of her evidence she was unimpeached in cross-examination and maintained that she was never at home on any of the occasions that the process servers claimed to have served her. In contrast, the process server, Mr Scott was the only one who made himself available to be cross-examined and like his affidavit evidence, his viva voce evidence was substantially lacking and he ought not to be given the benefit of the doubt.
- [20] It was submitted that the 2nd defendant provided irrefutable evidence that he was not in Jamaica on any of the occasions that he was allegedly served with the court documents. The pictures of the pages of his Canadian passport and also the official letter from PICA were more than sufficient evidence that the 2nd defendant was not in the jurisdiction when he was allegedly served. Upon the assessment of the evidence presented by the defendants as against that of the single witness for the claimant, Mr Scott, it was undeniable that the evidence

presented by each defendant was more credible and each corroborated the other's version of events.

[21] It was also submitted that if the default judgment is set aside as of right, then the final judgment would have to be set aside as well. The final judgment was entered in the absence of the defendants and without the defendants being given an opportunity to defend the claim. The process server who allegedly served the notice of assessments and interlocutory judgment did not present themselves for cross-examination and thus their affidavits are not in evidence. It followed that if there is no evidence to prove that the defendants were aware of the interlocutory judgment and of the date of the assessment of damages hearing, the benefit of the doubt must be given to the defendants.

Discussion and Analysis

[22] The provisions of Part 13 of the CPR govern the setting aside of a default judgment. I agree with counsel for the defendants that rule 13.2 makes it clear that where there was no service of the originating documents on the defendant(s), the default judgment must be set aside. It provides:

- 13.2 (1) The court **must** set aside a judgment entered under Part 12 if judgment was wrongly entered because –
- (a) in the case of a failure to file an acknowledgment of service, any of the conditions in rule 12.4 was not satisfied;
 - (b) in the case of judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied; or
 - (c) the whole of the claim was satisfied before judgment was entered.

- (2) The court may set aside judgment under this rule on or without an application. (Emphasis supplied)

So, the provisions of rule 13.2 make it plain that, as was submitted by the defendant's counsel, there is no discretion in the court with respect to setting aside a default judgment where the judgment was wrongly entered because of a failure to satisfy any of the requirements under the rules for entering judgment (see rules 12.4 and 12.5) including service of the originating documents. This is distinct from rule 13.3, which confers a discretion on the court as to whether to set aside a regularly entered default judgment. It provides:

- 13.3 (1) The court **may** set aside or vary a judgement 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. (Emphasis supplied)

[23] The defendants are contending that they were never served with the originating or any other documents filed in the claim. Having regard to the provisions of rule 13.2, if I find that on a balance of probabilities, there was no service of the originating documents on the defendants, I am obliged to set aside the default judgment.

[24] The burden is on the defendants to show why the judgment should be set aside (see **ED&F Man Liquid Products Ltd v Patel** [2003] EWCA Civ 472 at paragraph [9] per Potter LJ). Although Potter LJ was in **ED&F Man** expressing this view in the context of a regularly obtained judgment, I am of the view that it would be equally applicable to an irregularly obtained judgment under rule 13.2 of our CPR because he who asserts must prove.

[25] The defendants are challenging service of two sets of documents, that is, service of the originating documents and service of the default judgment, notice of the assessment of damages hearing date as well as other documents which would be used in the assessment of damages hearing such as witness statements. The lack of service of the notice of the assessment hearing date would result in the final judgment being set aside (see **Watson (Linton) v Sewell (Gilon) and Ors** [2013] JMCA Civ 10 and **Al Tec Limited v Hogan** [2019] JMCA Civ 9. Therefore, where service is concerned, there are two issues raised, which are:

- (i) Whether there was service of the originating documents on the defendants;
- (ii) If there was service of the originating documents, was there service of the assessment notice and other documents on the defendants;

Whether there was service of the originating documents on the defendants;

[26] The evidence of the 1st defendant that she is not “Patricia Newland” but ‘Petrena Newland” in my view raises serious doubt as to whether she was in fact served in circumstances where the process server, Mr Scott had given evidence in his affidavit of service filed on 23 June 2016 of serving the named defendant “Patricia Newland”. In addition, her evidence was that she would not have accepted service of somebody else’s mail. Her evidence was not shaken in cross-examination.

[27] I am of the view that the inconsistency between the named 2nd defendant and the correct name of the intended 2nd defendant was very significant and required a satisfactory explanation from Mr Scott as to why he had incorrectly

named the 2nd defendant as Patricia Newland in his first affidavit in circumstances where he claimed in his second affidavit that at the time of service, she corrected him about her name. Given Mr Scott's evidence under cross-examination that he had been a process server for 15 years, he ought to have appreciated that this information was significant. He admitted that before signing his affidavit, he had read it over yet he still signed it even though it had in the incorrect information. In addition, it is very curious that even though he had not refreshed his memory in relation to his alleged date of service of the originating documents on the defendants, he was able to recall that the 1st defendant had corrected him when he had addressed her as Patricia Newland. This was in circumstances where his second affidavit was filed some 5 years after the alleged date of service. I do not believe his evidence that he was able to recall this fact five years after serving the defendants as well as a physical description of her; this is more so given that he was unable to recall what he did before or after serving the defendants. He appeared to be saying that the attorney was responsible for the information that was contained in the affidavit, but in circumstances where he read the contents of the affidavit, it was his responsibility to ensure that he did not sign an affidavit that did not accurately reflect the circumstances surrounding his service of the documents. I am unable to accept Mr Scott as a witness of truth in these circumstances.

[28] Where the 2nd defendant is concerned, his evidence that he resides in Canada was not challenged and I am of the view that his evidence that he was not in Jamaica at the material time of 2016, it being supported by evidence from PICA, a third party, which it seems to me would have no reason to provide information that is untrue or biased in favour of the 2nd defendant, also raises doubt as to whether the 2nd defendant was in fact served. The 2nd defendant was not shaken in cross-examination so that he was discredited in his assertion that he was not present in Jamaica. It is true that there appears to have been a gap in the information provided by PICA in that there is no record accounting for when the 2nd defendant would have entered Jamaica between 2018 and 2019 in order for him to have been recorded as exiting Jamaica in February of 2019. However, it seems to me

that this would not be sufficient basis to discredit or disregard the information provided by PICA, particularly in circumstances where the issue was really whether the 2nd defendant was in Jamaica in 2016 and there was no appearance or suggestion of any irregularity in the information which had been provided in relation to the 2nd defendant's travels in Jamaica to or from 2016.

[29] In addition, I find it quite curious that Mr Scott deponed that the 2nd defendant was known to reside in Steer Town and in the face of the 2nd defendant's denial of this, he was unable to give any specific detail as to how he came by the information that put him in a position to make this statement. Given that he did not know the 2nd defendant before, he would have had to obtain this information from someone; yet his evidence was silent on this.

[30] Also, I do not find his evidence that he saw the affidavit of the 1st defendant but did not see the 2nd defendant's photograph believable in circumstances where the 1st defendant's affidavit spoke to the 2nd defendant's passport being exhibited. I find it was more likely than not that Mr Scott would have continued after reading the affidavit to look at the picture of the 2nd defendant. I find that it was too coincidental that it was after the 2nd defendant's passport was exhibited to the affidavit of the 1st defendant that Mr Scott provided a description of the 2nd defendant in his second affidavit, especially in circumstances where he did not refresh his memory before he signed that affidavit.

[31] I note that the claimant had sworn to an affidavit in response to the application. Among other things, he asserted that he had seen passports of family members and friends which do not have a stamp endorsing their arrival or departure from Jamaica and as a specific example, he referred to his "friend's son" who had returned to Jamaica, and stated that "if [he] were to use the endorsement in [that person's] visa, or the lack thereof, [he] would conclude that [the person] was still in America". He exhibited a copy of this passport to support his assertion. I am of the view that in relation to the issue of service, the claimant's affidavit is of little value as he could give no factual evidence pertinent to whether the defendants were served with any

documents filed in the claim nor was he present at the time of service. At the end of the day, it seems to me that it was a battle between the defendants and Mr Scott as to who should be believed in relation to whether the defendants were served and I find that Mr Scott has not given credible evidence to cast doubt on the defendants' evidence that they were not served.

[32] I therefore do not find Mr Scott to be a witness of truth and I am of the view that the defendants have satisfied the burden of proving that on a balance of probabilities they were not served with the originating documents.

[33] My conclusion on issue (i) that the defendants were not served with the originating documents makes it unnecessary for me to consider issue (ii). The ineluctable consequence of my finding that there was no service is that the default judgment must be set aside and all proceedings flowing from it.

[34] In the circumstances, I therefore make the following orders:

- (i) The default judgment entered on 28 June 2016 and all proceedings flowing therefrom is set aside;
- (ii) Costs of the application to the defendants to be taxed, if not agreed.