[2024] JMSC Civ. 07

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020CV01742

BETWEEN	**LOWAN LAWRENCE**	**CLAIMANT**
AND	**MUKESH SURESH BHATIJA**	**DEFENDANT**

IN CHAMBERS

Joerio Scott instructed by Samuda and Johnson appearing for the Defendant/Applicant

Jamila Maitland instructed by Campbell McDermott appearing for the Claimant/Respondent

HEARD: December 5th, 2023 and January 24th, 2024

Civil Procedure Rules — Application to set aside Default Judgment — Real prospect of success — 1- year delay between acknowledgment of service and application to set aside — Affidavit of merit and defence being provided by Counsel — Loss of telephone and inability to communicate with Counsel — Possible prejudice.

T. HUTCHINSON SHELLY, J

INTRODUCTION

[1] On the 24th of July 2022, the Defendant filed an application in which he seeks the following orders:

i. *The Defendant/ Applicant be relieved from sanctions pursuant to the Civil Procedure Rules, 2022.*

ii. *The Default Judgment dated the 21st of December 2020 entered herein and subsequent proceedings be set aside.*

iii. *The Acknowledgment of Service filed herein on the 25th of January 2021 be permitted to stand.*

iv. *The Defendant/ Applicant be permitted to file a Defence within fourteen (14) days of the Order herein.*

v. *That costs to be costs in the Claim.*

vi. *Such further or other relief as this Honourable Court deems just in the circumstances.*

[2] The application is supported by an affidavit sworn to by Faith Gordon, Attorney-at-Law and exhibits a Draft Defence. It is the Defendant's position that the collision between his vehicle and the vehicle in which the Claimant was a passenger was caused by an unknown motorist who was overtaking on the Defendant's side of the roadway. The Defendant asserted that this action caused him to swerve to avoid a collision and brought his vehicle into contact with that of the Claimant. The application is filed pursuant to Rule **13.3** of the Civil Procedure Rules (CPR) and it is the Defendant's position that he has a real prospect of success at trial and the Default Judgment entered should be set aside.

[3] The application is opposed by the Claimant who raised a number of questions which included the strength of the defence raised and whether the Defendant ought to be rewarded for his delay in acting. In my examination of this matter, I found it useful to consider the chronology of events which are outlined as follows:

a. On the 4th of June 2020, the Claim was filed.

b. On the 9th of June 2020, Notice of Proceedings was served on Advantage General Insurance Company, the Defendant's Insurers.

c. On the 24th of September 2020, the Claim Form, Particulars of Claim and accompanying documents were served on the Defendant.

d. On the 21st of December 2020, the Claimant filed a request for Default Judgment.

e. On the 21st of December 2020, Default Judgment was entered in Judgment Binder #777 Folio #157. The judgment was perfected on the 18th of August 2021.

f. On the 25th of January 2021, an Acknowledgment of Service was filed on behalf of the Defendant.

g. On the 24th of May 2022, a Notice of Case Management Conference for Assessment of Damages and Interlocutory Judgment were served on Messrs. Samuda and Johnson.

h. On the 4th of July 2022, the Notice of Application to Set Aside Default Judgment and Affidavit in Support were filed.

i. On the 5th of July 2022, the Case Management Conference was adjourned to the 30th of November 2022 as the Application to set aside Default Judgment which had been filed the day before, had not been served and a date needed to be scheduled for its hearing.

j. The Application was heard on the 5th of December 2023.

ISSUES

[4] In arriving at a decision on this application, the Court has to decide the following issues:

1. Whether the Applicant has a real prospect of successfully defending the claim to justify the setting aside of the judgment in default?

2. Whether the Applicant applied to the Court as soon as is reasonably practicable after finding out that judgment has been entered?

3. Whether the Applicant has given a good explanation for the failure to file an Acknowledgement of Service?

WHETHER THE APPLICANT HAS A REAL PROSPECT OF SUCCESSFULLY DEFENDING THE CLAIM TO JUSTIFY THE SETTING ASIDE OF THE JUDGMENT IN DEFAULT?

Applicant's Submissions

[5] In support of the Defendant's position that he has a reasonable prospect of successfully defending this claim, Mr Scott made reference to the averments in the affidavit of Ms Gordon and Draft Defence as to how the collision occurred. He contended that there was no negligence on the part of the Defendant as it was the actions of a 3rd party which were entirely to blame as that individual sought to overtake on the Defendant's side of the road causing him to swerve in order to avoid a collision but notwithstanding the care exercised, he collided with the Claimant's vehicle. Mr Scott argued that this evidence is sufficient to raise an absolute defence to the action filed by the Claimant. Counsel asserted that the quality of this evidence is worthy of ventilation at a trial and could not properly be described as merely fanciful/arguable. Counsel asked the Court to note that the Defendant did not only make vague reference to a third party but provided a description of the vehicle as a black **BMX X6** and this was sufficient to bolster the credibility of this assertion. Mr Scott contended that in the circumstances, the question of credibility will be of great importance in determining how the collision occurred and this is sufficient to warrant the testing of the Claimant's case at a trial.

Respondent's Submissions

[6] In submissions in response, Ms Maitland commended to the Court a number of authorities which outline the relevant factors for consideration. Counsel highlighted the remarks of Brooks J in **Henry Harris v Mario Fyffe and Marie Lopes Gordon (unreported), The Supreme Court of Judicature of Jamaica,** Claim No. 2005HCV2562 that the court's power to revoke the expression of its coercive power must be exercised in the context of Rule **13**. Counsel also emphasised the pronouncement by the Learned Judge that for the Defendant to have a real prospect of successfully defending the claim, he is required to have a case which is better than merely arguable.

[7] Ms Maitland also highlighted the decision of Sykes J. (as he then was) in **Andrew Robertson v Toyojam Ltd and Haughton (unreported) Supreme Court of Jamaica,** Claim No. 2006HCV2311 wherein he stated that:

> "*The test for having a real prospect of succeeding under rule 13.3 is not met by simply pleading a legally cognizable defence but also extends to whether there is evidence to support the defence*."

[8] Counsel also asked the Court to consider the guidance provided in **Sasha-Gaye Saunders v Michael Green et al (unreported) Supreme Court of Jamaica,** Claim No. 2005HCV2868 and **Flexnon Limited v Constantine Michell Anors** [2015] JMCA App 55. Specific reference was made to paragraph 32 of the latter where McDonald-Bishop JA stated:

> "*In our jurisdiction, where there is an embedded and crippling culture of delay, significant weight must be accorded to the issue of delay, whenever it arises as a material consideration on any application. The application to set aside a regularly obtained default judgment is one such type of application where the consideration of delay should figure prominently. "*

[9] Ms Maitland contended that applying these principles of law to the instant case, it is clear that the Defendant has not met the required threshold of a real prospect

of successfully defending the claim. Counsel argued that while the account confirms that he lost control of his motor vehicle as the Claimant had stated, there is no cogent evidence to prove that there had been another vehicle involved, except for his 'say so'. She described this defence as being at best arguable and/or fanciful. Ms Maitland asked the Court to be mindful of the fact that in seeking to raise an affirmative Defence, the Defendant has a burden to substantiate his assertions and the affidavit on which he relies provides nothing in this regard.

DISCUSSION

[10] The thrust of Counsel's submissions during the hearing focused on Rule **13.3** of the CPR which grants the court the power to set aside a Default Judgment and provides as follows:

> *(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."*

[11] The general principle regarding the setting aside of Default Judgments is encapsulated in the seminal case of **Evans v Bartlam** [1937] A.C. 473 where Lord Atkin stated that:

> "*The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.*"

[12] This principle has been examined and applied in several decisions from our Courts which have been cited and relied on by Counsel for the respective parties. One of the more notable decisions is the case of **Flexnon Limited** (supra) where the relevant test in respect of a **13.3** application was considered. In that decision, McDonald-Bishop JA stated at paragraph 15 as follows:

> *"the primary test for setting aside a default judgment regularly obtained is whether the defendant has a real prospect of successfully defending the claim. The defence must be more than arguable to be such as to show a real prospect of success."*

[13] The first limb of rule **13.3** is often described as being of paramount consideration to the Court. The test is the same as in an application for summary judgment, which states that the defendant must have a real prospect of successfully defending the claim rather than a fanciful one. In determining whether the test has been satisfied, there must be a defence on the merits to the requisite standard. The case law also makes it clear that the evidence presented should reveal more than a merely arguable case.

[14] In considering the evidence on which the Defendant relies in support of his assertion that he has a real prospect of success, it is instructive that this information comes not from the Defendant himself but from Counsel. It is also noteworthy that the Defendant did not personally provide this Affidavit of Merit, although Ms Gordon averred that he had been located, advised of this matter and instructions were clearly taken which prompted the filing of the Acknowledgment of Service, Defence and this application. Having made this observation however, I am mindful of the fact that in respect of interlocutory applications, the rules permit the filing of an affidavit which contains hearsay evidence and the absence of an Affidavit of Merit from the Defendant is not sufficient to operate as a bar to the application succeeding.

[15] In analysing this defence, I have taken note of the Claimant's pleadings and note that they do not mention any other vehicle or vehicles as being involved in this

incident. Additionally, although the Defendant's affidavit and Draft Defence had been served on the Claimant in July 2022, there was no affidavit from the Claimant or anyone on his behalf which provided any evidence to the contrary. In the circumstances, the Defendant's assertions stand unchallenged and the Court must be mindful of this fact in considering whether the requisite threshold for this application has been met.

[16] On the Defendant's account, he was faced with a situation in which he was about to be involved in a 'head on collision' as a result of the actions of an unknown driver and it was in these circumstances that he swerved. Section **51(2)** of the Road Traffic Act imposes a duty on the driver of a motor vehicle to take such actions as may be necessary to avoid an accident and a driver faced with this possibility and operating under this duty would be acting in accordance with the Road Traffic Act by swerving out of the path of the oncoming vehicle. Although the account of the Defendant has not provided specific details as to the identity of this 3rd party, I am satisfied that the defence raised has a real prospect of succeeding at a trial. This opinion is bolstered by the absence of any evidence to the contrary to persuade the Tribunal otherwise. Accordingly, it is my finding that the Defence raised has surpassed the categories of being fanciful or merely arguable and a Tribunal could properly find in favour of the Defendant on same.

WHETHER THE APPLICANT APPLIED TO THE COURT AS SOON AS IS REASONABLY PRACTICABLE AFTER FINDING OUT THAT JUDGMENT HAS BEEN ENTERED?

Applicant's Submissions

[17] In addressing the timing of this application, Mr Scott submitted that the Defendant's Acknowledgement of Service was filed on the 25th of January 2021, shortly after they received instructions from their institutional client to act on behalf of the Defendant. Counsel made reference to the affidavit of Ms Gordon which outlined that numerous attempts were made to contact the Defendant to

take his instructions in order to prepare a Defence, but those attempts were unsuccessful. Counsel asked the Court to note that it was in February 2022 that contact was eventually established with the Defendant by his Insurers after which contact was again lost and not re-established until June 2022. Counsel highlighted that by the following month, the application had been filed. In this affidavit, Ms. Gordon averred that as a result of the said collision, the Defendant suffered hardships which made it difficult for him to be contacted as he has been unemployed since 2018 and was inconsistent in his ability to maintain a cell phone. Mr Scott submitted that these were factors which negatively impacted the Defendant's ability to act and taking these variables into account, the Court could find that the delay, while it existed, was not inordinate or indicative of a lack of interest on the Defendant's part.

Respondent's submissions

[18] In the Claimant's outline of the sequence of events in this matter, Ms Maitland acknowledged that the Interlocutory Judgment was served on Counsel for the Defendant on the 24th of May 2022, along with the Notice of the Case Management Conference. Counsel contended that the evidence provided did not support the assertion that the Defendant had sought to act with alacrity as his Insurers were able to make contact with him in February 2022 and would undoubtedly have informed him that a Default Judgment had been entered against him. Counsel submitted that careful note should also be taken of the fact that a further five (5) months elapsed before the Notice of Application was filed and by not contacting his Attorneys-at-law between February 2022 and July 2022, it would be a reasonable assumption that the Defendant did not take the court proceedings seriously so as to provide instructions in a timely manner. Ms Maitland submitted that in any event, given the passage of time, the Court should find that the delay is inordinate.

DISCUSSION

[19] The case of **Russell Holdings Limited v L & W Enterprises Inc. and ADS Global Limited** [2016] JMCA Civ. 39 provides useful guidance on the other factors which a Court should consider in an application such as this. Special note is taken of paragraph 83 of the judgment where the Learned Judge stated:

> *"[83] A defendant who has a real prospect of successfully defending the claim may still be shut out of litigation if the factors in rule **13.3(2) (a)** and **(b)** are considered against his favour and if the likely prejudice to the respondent is so great that, in keeping with the overriding objective, the court forms the view that its discretion should not be exercised in the applicant's favour. If a judge in hearing an application to set aside a default judgment regularly obtained considers that the defence is without merit and has no real prospect of success, then that is the end of the matter. If it is considered that there is a good defence on the merits with a real prospect of success, the judge should then consider the other factors such as any explanation for not filing an acknowledgement of service or defence as the case may be, the time it took the defendant to apply to set the judgment aside, any explanation for that delay, any possible prejudice to the claimant and the overriding objective.*

[20] Applying this statement of law to the instant matter, I then considered the factors outlined at Rule **13(2)(a)** and **(b)**. In this situation, the application to set aside the Default Judgment was filed just over a month later on the 4th of July 2022. Although it is not in dispute that the Claimant had provided notice to the Defendant that Default Judgment had been requested from the 25th of January 2021. The relevant period begins to run from notice of the actual entry of judgment. The review of the timeline of events reveals that the application, while not filed contemporaneously with the notification provided, was filed approximately six (6) weeks after. As such, while there was a lapse of time between when the Defendant became aware of the judgment and when the application was filed, it would be wholly inaccurate to describe the intervening

period as falling within the category of inordinate delay. Accordingly, it is my finding that the application was made as soon as was reasonably practicable.

WHETHER THE APPLICANT HAS GIVEN A GOOD EXPLANATION FOR THE FAILURE TO FILE AN ACKNOWLEDGMENT OF SERVICE?

Applicant's Submissions

[21] In submissions on this point, Mr Scott acknowledged that the Acknowledgment of Service was not filed until the 25th of January 2021. He argued that while there was some delay between service and the filing of this document, the Defendant has provided an explanation for same which deserves careful consideration by the Court. Counsel again made reference to the affidavit of Ms Gordon where it was stated that the Defendant had suffered financial setbacks and had been unable to keep a cell phone which impacted the ability for communication to be had with him. Mr Scott contended that given the impecuniosity of the Defendant and its impact on his ability to provide instructions, the delay on his part should not be deemed by the Court to be inordinate. In support of this assertion, Counsel relied on the remarks of Brooks JA in **The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr (A minor) By Rakasha Brooks Snr (His father and next friend)** [2013] JMCA Civ 16 where he stated that "*the length of the delay should not be considered as determinative of the application*".

Respondent's Submissions

[22] In responding on behalf of the Claimant, Ms Maitland asserted that the contents of the Affidavit in support of the Notice of Application fail to provide a reasonable explanation for the Defendant's delay in filing an Acknowledgement of Service, as he had been served from September 2020. Counsel contended that the inability to maintain a phone should not be accepted by the Court as a reasonable explanation under the circumstances as the Defendant ought to have read the documents and made efforts to contact his Attorneys. Counsel argued

that the Defendant ought not to be allowed to flout the established timelines and should be made to face the repercussions of same.

DISCUSSION

[23] It is not in dispute between the Parties that service was effected in September 2020 and the Acknowledgment of Service was not filed until over four (4) months later. While the Defendant has sought to blame the delay in filing the Acknowledgment of Service on his impecuniosity and inability to maintain a cell phone, I agree with the submissions of Ms Maitland that the absence of a cell phone does not provide a good explanation for this failure to respond to the papers which had been served at his home. It is clear from the evidence provided that the Defendant was covered by insurance and his Insurers had sought to make contact with him about this matter. The fact that they were able to make contact eventually clearly indicates that he was still capable of being contacted and must have possessed the means to make contact himself. His delay in doing so cannot then be written off as being caused by impecuniosity. While this explanation is wholly inadequate to qualify as a good explanation, I acknowledge the remarks of Brooks JA in the **Rashaka Brooks** decision and agree that in light of the earlier findings, this failure could not be determinative of the application itself.

OTHER CONSIDERATIONS

Prejudice

[24] On the issue of possible prejudice, Mr Scott submitted that in light of the economic hardships which the Defendant has suffered as a result of this incident, if the Court were to maintain this judgment it would only result in further economic prejudice to him. Counsel asked the Court to note the absence of any evidence in response to the Application and asserted that in these circumstances, the Claimant has failed to present any prejudice which he may

likely suffer and, on that basis, the Court is obliged to prefer the Defendant's evidence and to grant the orders as prayed.

[25] Ms Maitland submitted that contrary to the assertions of Counsel for the Defendant, greater prejudice would be done to the Claimant who had secured his judgment against the Defendant and waited for the Defendant to 'get his house in order'. Counsel argued that the Claimant would endure greater hardship if he is faced with further delay by embarking on a trial for a merely arguable Defence. Ms Maitland asked the Court to find that the overriding objective should be exercised in favour of the Claimant and the matter allowed to proceed to the Assessment of Damages hearing.

DISCUSSION

[26] Although the question of possible prejudice being suffered by the Claimant would usually arise for the Court's consideration, in this situation, there was no evidence advanced in support of same. While the Court accepts that the Claimant could conceivably be prejudiced by the loss of her Default Judgment, I am satisfied that the Defendant would face greater prejudice given the strength of his defence. Accordingly, I find that the defendant must be afforded an opportunity to be heard on his defence and any possible loss which may be occasioned to the Claimant could be appropriately addressed in costs.

Relief from sanctions

[27] Mr Scott also asked for an order that the Applicant be granted relief from sanctions for the failure to file his Acknowledgment of Service and for an extension of time to file a defence. In respect of these orders, he referred the Court to the decision of **Rashaka Brooks** (supra) where the Court outlined the principles which ought to be considered on an application for an extension of time to file a defence. Counsel submitted that there was sufficient basis for the Court to find that the delay in filing the application was not inordinate and to accept the explanation provided for the delay.

[28] While Rule **26.8** of the CPR provides that a Party can seek an order for a grant of relief from sanctions where there has been default and a sanction entered, this application would have been overtaken by the entry of Judgment and the matter being set down for assessment. In any event, the Application to set aside Default Judgment would address the situation in which the Defendant now finds himself, as on the success of this application, the Acknowledgment of Service and Defence filed could be permitted to stand. In the circumstances, this order would be unnecessary.

Conclusion

[29] In light of the foregoing findings, the Court makes the following orders:

1. The Default Judgment entered on the 21st of December 2020 and subsequent proceedings are set aside.

2. The Acknowledgment of Service filed herein on the 25th of January 2021 is permitted to stand.

3. The Applicant is permitted to file a Defence within fourteen (14) days of the Order herein.

4. Costs awarded to the Claimant to be taxed if not agreed.

5. Applicant's Attorney to prepare, file and serve the Formal Order herein.