IN THE SUPREME COURT OFJUDICATURE OF JAMAICA
IN COMMON LAW

SUIT NO. C.L. 2001/L098

BETWEEN	RICHARD LEWIS	CLAIMANT
AND	NORMA DUNN	DEFENDANT

Miss Alicia Thomas instructed by K.C. Neita & Company for the claimant

Miss Antonica Coore for defendant on April 16, 2004

Miss Laverne George for the defendant on May 12 and 20, 2004

April 16, May 12 and 20, 2004

SYKES J (Ag)

APPLICATION TO SET ASIDE DEFAULT JUDGMENT UNDER RULE 13.3 OF THE CIVIL PROCEDURE RULES

THE CONTEXT

The bailiff is armed with an order for seizure and sale of goods. He is seeking to enforce a judgment with interest and costs for a sum in excess of JA$2 million against Miss Dunn. This was the consequence of an

assessment of damages made by Mangatal J (Ag) (as she then was) on October 16, 2003. The claimant alleged that the defendant breached an oral contract.

Miss Dunn has made an application to stay the bailiff's hand and to set aside the judgment. The issue is whether this application should be granted.

In this application Miss Norma Dunn makes quite an astonishing claim. She alleges that she was not served with any process issued out of this court by any of the process servers who swore affidavits that they had done so. This is a most serious allegation. If she is correct it would mean that Mr. Alrick Sucki and Mr. Boston Smith, the process servers in this matter, would have lied on oath and caused damages of JA$1,545,000 to be assessed against the defendant.

These bold assertions were made by the defendant in her affidavit filed in support of a notice of application for court orders in which she sought the following orders:

1. service of the specially endorsed Writ of Summons be set aside;
2. judgment entered on the 6th day of October 2003 be set aside;
3. enforcement of judgment dated the 17th of March be set aside for ten days;
4. that all subsequent proceedings be stayed;

Her grounds for claiming these orders were:

1. the defendant was never served with the specially endorsed Writ of Summons or any subsequent document;

2. the defendant only became aware of this action on the 24th of March 2004 when the bailiff attended at her home to execute the Order for seizure and sale;
3. the defendant does have a defence to the action.

THE AFFIDAVITS

Mr. Boston Smith, a District Constable of the Ocho Rios Police Station, swore in his affidavit dated February 11, 2002 that he served Miss Dunn was personally served, on January 22, 2002, with a sealed copy of the specially endorsed writ at Lot 148, Coconut Close, Spring Valley Estate, Tower Isle, St. Mary.

Miss Fay Rogers, an office attendant in the chambers of K.C. Neita and Company swore in an affidavit dated June 12, 2002 that when she checked the file on June 12, 2002 the defendant had not entered an appearance or filed a defence. She filed similar affidavits dated July 23, 2002 and September 6, 2002. Thus, six months, after personal service Miss Dunn had not filed what was then known as an appearance and neither had she file a defence.

Miss Tanya Campbell in her affidavit dated October 29, 2002 swore that she sent, by registered mail, a sealed copy of the interlocutory judgment in default of appearance and defence and a summons to proceed to assessment of damages both dated July 23, 2002. The address was Lot 148 Coconut Close, Spring Valley Estate, Tower Isle, St. Mary. This is supported by registered slip no 220163.

There was also proof that the order on summons to proceed to assessment of damages dated November 19, 2002, notice of assessment of damages date December 2, 2002 and

notice of intention to tender hearsay evidence were sent by registered post addressed to Miss Dunn of Lot 148, Coconut Close, Spring Valley Estate, Tower Isle, St. Mary (see affidavits of Fay Rogers dated January 30, 2003).

Mr. Alrick Sucki in his affidavit dated October 15, 2003 swore that he served personally on Miss Dunn the following:

a. a sealed re-issued notice of assessment of damages dated December 2, 2002.
b. notice of intention to amend the statement of claim dated August 7, 2003 with the proposed amendment statement of claim specially endorsed.

He served her at Lot 148 Coconut Close, Spring Valley, Tower Isle, St. Mary on October 11, 2003 at approximately 1:30pm.

FURTHER ORDERS

Miss Antonica Coore, attorney at law, who held for Miss Laverne George when the matter first came before me on April 16, 2004 applied for an order that both process servers attend for cross examination on their affidavits. This order was made.

The court made a further order, on the application of Miss Alicia Thomas that Miss Dunn should attend for cross examination.

The court granted permission to Miss Dunn to file further affidavits in support of her case that she was not served. She did not take advantage of this opportunity. She said she could not find any documentary proof to support

her contention that she was out of the island in January of 2002.

THE RULES

Miss George relied on rule 13.3(1) of the Civil Procedure Rules (CPR). It reads:

> *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 had been entered;*
>
> *(b) 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.*

There is no issue of rule 13.2 applying here. It is no secret that the new Civil Procedure Rules are based upon the English rules and in many respects the rules are quite similar. However there are important differences between them and the rule in issue here is one such example of that difference.

Rule 13.2 should be contrasted with the equivalent English rule. The comparison is designed to make the point that the rules in Jamaica require three conditions that must be met before the question of exercise of the

discretion to set aside a judgment can arise. The English rule 13.3 reads:

> *(1) In any other case, the court may set aside or vary a judgment entered under Part 12 if –*
>
> *(a) the defendant has a real prospect of successfully defending the claim; or*
>
> *(b) it appears to the court that there is some other good reason why –*
>
> *(i) the judgment should be set aside or varied; or*
>
> *(ii) the defendant should be allowed to defend the claim.*
>
> *(2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly.*

The Jamaican rule requires (a) an application as soon as the defendant is aware of the judgment, (b) a good explanation **AND** (c) a real prospect of successfully defending the claim. This "***and***" is conjunctive. Unless there is an application the court will not know whether it can exercise the power under rule 13.3(1). Therefore all three conditions are necessary conditions that must be met. By contrast the English rules require **either** (a) a real prospect of successfully defending the claim **OR** (my emphasis)(b) where it appears to the court that is some other good reason why the judgment should be set aside or varied or that the defendant should be allowed to defend

the claim. It should be noted that the expression "*it appears to the court that there is some other good reason…*" does not appear in the rule 13.3 of the Jamaican rules. That formulation in the English rules gives the English courts a much wider basis upon which they can exercise the discretionary power. No such wide discretion is given to the courts here.

In the English rules, having a real prospect of successfully defending the claim is stated to be a "good reason". This is the necessary and inescapable inference to be drawn from the use of the word "other" in the phrase "other good reason" in rule 13.3(1) (b). By way of further contrast the Jamaica rule uses the expression "only if" whereas the English rule speaks to "if". The adverb "only" qualifies "if" to make the point that the possibility of exercising the discretion does not arise unless the defendant makes meets the criteria laid down by the rule. This makes it clear that the Jamaican Rules Committee opted for a higher threshold.

THE EVIDENCE

Both process servers and Miss Dunn were cross examined on their affidavits. I accept the testimony of both process servers. They were honest and reliable.

Under cross examination by Miss George a number of details emerged in Mr. Sucki's evidence:

a. on the day in question he was searching for the Miss Dunn;

b. a red Toyota motor car similar to the police cars stopped by him, while was ringing a bell on a gate that was not Miss Dunn's house;

c. Miss Dunn and her daughter were in the car. Miss Dunn asked him if he was looking for anyone. He said Miss Norma Dunn whereupon she identified himself to her;

d. He told her who he was and why he was looking for her. She drove away. He went down to her house and served here the document.

Mr. Sucki was challenged about this but he responded by giving great detail about the physical layout of the house. His details were not challenged or denied or modified in any way by the defendant. How could he have given these details unless he saw Miss Dunn? How would he know that she was the driver of a red Toyota motor car unless he saw her?

He said that the house was a big white house with a balcony at the back. It also had a red roof. There were gate columns at the entrance to the property but no actual gate. He added that when one enters the gate there is parking area to the left of the house. I do not believe that Mr. Sucki was making up this description. In any event Miss Dunn did not dispute his description.

Mr. Boston Smith was also cross examined. He described the house as a big white house. He said that it was a two storey house and the gate had a big grill gate. This is a discrepancy between Mr. Sucki and Mr. Smith. Mr. Sucki said there was no gate when he went there in 2003. However this is not fatal to their credibility since it could be that there was a gate when Mr. Smith went there but it was

absent when Mr. Sucki went to the house. According to Mr. Smith when he went there he saw a young lady who called Miss Dunn.

In addition to the description of the property both men captured a vignette of Miss Dunn's personality. This kind of character sketch is unlikely to be the product of collusion. Mr. Smith said that when he told her why he was there she said, "Mi and police no inna nutten. Whey police a come a mi yaad fah." She was behaving in an ungracious manner. Mr. Sucki stated that when he was speaking to her after she had stopped, she then drove away as soon as he mentioned the claimant's name.

Miss Dunn sought to refute the process servers' evidence by saying that she did not see any of them. She agrees that she lives at Lot 148, Coconut Close, Spring Valley Estate, Tower Isle, and St. Mary. She said that she lived also in the United Kingdom.

FINDINGS AND CONCLUSION

I do not believe her when she says that she was not served personally with any document. I have concluded that she only decided to act when the bailiff turned up to enforce the judgment of the court. Until that time she ignored the writ and the various documents sent by registered post.

I find that she knew of the judgment from either late 2002 or early 2003. She did nothing. I find that she knew that not only had judgment been entered, but that the claim was going to assessment. Miss Dunn has not satisfied rule 13.3(1) (a) or (b). She has not applied as soon as practicable after finding out that judgment had been

entered. She has not given a good explanation for her failure to file a defence or acknowledge service.

Having regard to my interpretation of rule 13.3 there is no need to consider whether there is a real prospect of successfully defending the claim.

The defendant's application is dismissed. Costs to the claimant to be agreed or taxed.