[2022] JSMC Civ 205

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021HCV01438

BETWEEN	**DWAYNE MCLEAN**	**CLAIMANT**
AND	**DESMOND WILLIAM MCKENZIE**	**DEFENDANT**

IN CHAMBERS

Mr Courtney Rowe instructed by Jacobs Law for the claimant.

Miss DeAndra Butler instructed by Samuda & Johnson for the defendant.

Heard June 30, 2022 and December 9, 2022

Setting aside Default Judgment under CPR 13.3 - Is there a defence with a real prospect of success - If there is a defence with a real prospect of success how should the considerations under CPR 13.3(2) be applied on the facts.

IN CHAMBERS

JARRETT, J. (AG.)

Introduction

[1] This is an application by the defendant to set aside the default judgment entered against him on June 21, 2021. The claim out of which the default judgment emanates was filed on March 26, 2021 and served on the defendant on April 12, 2021. The claimant alleges that on August 18, 2020, he was a pedestrian along the Woodstock Main Road, Buff Bay in the parish of Portland, when he was hit down by the claimant's Toyota Hilux pickup truck. He claims to have suffered

personal injuries as a result, and contends that the incident was caused by the negligence of the defendant who was improperly attempting to overtake a motorcycle.

The application

[2] The defendant's notice of application was filed on September 20, 2021 and is supported by an affidavit sworn by him and filed on that same day. Although not cited, it is clear from the grounds relied upon, that the application is made pursuant to CPR 13.3 as the nub of the defendant's contention is that he has a defence to the claim with a real prospect of success.

[3] In his affidavit, the defendant blames the accident on one Lloyd Mase who he said was a motorcyclist who negligently operated his motorcycle in such a way that it suddenly and without notice turned into the path of his Hilux pickup truck. He immediately applied his brakes and swerved right to avoid a collision with the motorcycle, but in doing so he hit into the claimant who was not using the sidewalk. In the draft defence exhibited to his affidavit, the defendant goes on to also blame the claimant for the accident and says that he was walking in the road, and along with Lloyd Mase, caused the accident or contributed to it by his negligence. He claims that the claimant failed to keep any or any proper look out; failed to use the sidewalk; walked in the road at a time when it was unsafe to do so, and failed to take any care for his own safety.

[4] The defendant's evidence is that he was served with "court documents" on or about April 12, 2021, and he took them to his insurers, Advantage General on April 14, 2021. He was advised by his attorneys-at-law, Samuda & Johnson that they first received instructions from Advantage General on June 29, 2021. He genuinely believed that the insurers were "taking care of the matter" and the reason for the delays was because of the length of time the insurers took to retain counsel. He says his delay was not intentional. He will suffer severe prejudice if the judgment is not set aside and this would be due to no fault of his. On the other hand, he says that the claimant will suffer none.

[5] The claimant did not file an affidavit in response to the application.

Submissions
The defendant

[6] Counsel Miss DeAndra Butler argued that the defence has a real prospect of success as the defendant contends that the accident was either caused or contributed to by the claimant as he was not using the sidewalk at the material time. She said that the claimant was in the roadway when the accident occurred, and her client's manoeuvre was indicative of what a reasonable driver would have done in the circumstances. According to counsel, the proposed defence is more than arguable.

[7] Ms Butler submitted that the existence of the default judgment came to the defendant's attention in July 2021, and he made the application in September 2021. She viewed two months as "not excessive in the circumstances", especially since the defendant acted to set aside the default judgment before he was formally served with it. Counsel pointed to the defendant's affidavit evidence in which he says that when he was served with the claim form, he took it to his insurers. The insurers, counsel said, took a "long time" to instruct the law firm of Samuda & Johnson. They received the defendant's instructions in April 2021, but did not take steps to deal with the matter until late June 2021.

[8] Beyond a mere inconvenience in being prevented from immediate recovery of the proceeds of his judgment, Miss Butler in her written submissions says that there is nothing in the evidence to cause me to find that the claimant would be prejudiced if the default judgment is set aside. On the other hand, she says the defendant would suffer injustice were I to refuse his application, as he would be denied the opportunity to have his contentions as to how the accident occurred tested at a trial. She said that the overriding objectives of the CPR favoured the granting of the application.

The claimant

[9] Counsel Mr Rowe vigorously opposed the application. He said that there is no evidence from either Samuda & Johnson or Advantage General to corroborate the claimant's affidavit evidence. No explanation has been given for the failure to file an acknowledgment of service or defence within the time stipulated by the CPR. According to Mr Rowe, the defendant has not given any evidence as to when he became aware of the default judgment and when he filed his application to set it aside. There is nothing before the court to determine whether or not the defendant had a good explanation for failing to abide by the timelines of the CPR. Counsel asked that no protection be given by the court to the defendant considering the deficiencies in his affidavit. He likened the defendant's evidence to "passing around the donkey of blame".

[10] In relation to the proposed defence, Mr Rowe said that the affidavit evidence does not disclose that the defendant has a defence with a real prospect of success. The defendant does not outline the circumstances which placed the claimant in the road at the time of the accident. Counsel posited that the defendant's presence in the road could have been for any "lawful purpose". In swerving right as the defendant contends, he placed himself on the side of the road where he ought not to have been.

Analysis and discussion

[11] The relevant provisions of the CPR giving the court a discretion to set aside a default judgment regularly obtained are 13.3(1) and (2). They provide as follows:

> "13.3 (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 is 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."

[12] It is now settled that the threshold test is whether or not the defendant has provided evidence to establish that he or she has a defence with a real prospect of success within the meaning of CPR 13.3(1). The court of appeal has said in several decisions in recent times, that if a judge finds that the proposed defence meets this threshold test, it must go on to considers the factors in CPR 13.3(2)(a) and (b), but the enquiry ends if the test has not been met. See for example the recent decision in **Christopher Ogansulu v Keith Gardner [2022] JMCA Civ 12.**

[13] I must therefore start my analysis with the proposed defence

Does the defence have a real prospect of success?

[14] As I understand the defendant's defence, he was forced to take evasive action to avoid a collision with the motorcyclist Lloyd Mase, and in doing so he collided with the claimant who was a pedestrian walking in the roadway and not using the sidewalk. In his draft defence which he exhibits to his affidavit in support of his application, he states that the claimant and Lloyd Mase were either directly responsible for the accident or where contributory negligent. No evidence was provided by the claimant to challenge this allegation. Counsel Mr Rowe in resisting the application suggested that the defendant put himself on the wrong side of the road and that it could well be that the claimant was lawfully in the road at the material time. That may well be so, but the claimant has provided no evidence to indicate where on the road he was and why. At this stage it is not for the court to engage in a mini trial even though I must consider all the evidence before me including any documents being relied upon which contradict the proposed defence. (**Joseph Nanco v Anthony Lugg and B & J Equipment Rental Limited [2012] JMSC Civil 81).**

[15] The evidence of the defendant is plainly that the claimant was not using the sidewalk, he was walking in the roadway, and as a consequence he caused the collision or contributed to it. I agree with counsel Miss Butler. This is a defence which in my view is one which is more than arguable and is not fanciful. I therefore find that it has a real prospect of success. I therefore must now consider whether or not the defendant made his application as soon as reasonably practicable after becoming aware of the default judgment, and whether he has provided a good explanation for not complying with the provisions of the CPR for acknowledging service and filing a defence.

Has the defendant applied to set aside the default judgment as soon as reasonably practicable?

[16] I observe that the defendant does not say in his affidavit, exactly when he became aware of the default judgment. In paragraph 6 of his affidavit, he says that in July 2021 he was contacted by Samuda & Johnson and advised that they had been instructed by his insurers to represent him. He goes on to say in paragraph 7 that he has been advised by Samuda & Johnson that his insurers' instructions first came on June 29, 2021. It is in paragraph 8 that he then says:

> "That Samuda & Johnson also informed me and I do verily believe that a Default Judgment had been entered against me in this matter."

It is in counsel Miss Butler's submissions, both oral and written that she says that the defendant became aware of the default judgment in July 2021.

[17] I will accept, on a generous interpretation of paragraphs 6, 7 and 8 of the defendant's affidavit, when read together, that he was advised of the default judgment in July 2021 when he was first contacted by Samuda & Johnson and told that they were instructed to represent him. But I have a difficulty with counsel's characterisation of the period of two months between becoming aware of the default judgment and applying to set it aside, as not being excessive in the circumstances, and the placing of blame squarely on the insurance company.

[18] The defendant has provided no evidence to explain why it took two months to make his application. On his evidence, his counsel was retained on June 29, 2021, they brought the default judgment to his attention on an unspecified date in July 2021 and the application before me filed September 20, 2021. In the absence of an explanation as to why it took approximately two months to apply to set aside the default judgment, how can I determine that the defendant acted as soon as reasonably practicable? What is reasonably practicable depends on the circumstances of each case. It is a matter of context. But I have no evidence to help me to decide whether two months was realistic and feasible (which is what I understand reasonably practicable to mean), in the context of this case. It is not enough to say that two months was found to be reasonably practicable in a previous decided case with a different set of facts. The decided cases in this area of the law speak to the need for litigants to act with celerity when faced with a default judgment they wish to set aside. There must be urgency on their part in recognition of the value of a default judgment and the need to respect and adhere to the rules of court. Without any explanation from the defendant, I cannot find that he acted as soon as reasonably practicable to set aside the default judgment after becoming aware of it. Although he was served with the default judgment in October 2021, which is after his application was made, the fact is that the CPR 13.3(2)(a) contemplates action on the part of the defendant when he or she becomes aware of the existence of the default judgment. In this case, the defendant on his own evidence and based on his counsel's submissions, became aware of the judgment even before service. He was therefore under a duty to swiftly act from the time its existence came to his knowledge, which was in July 2021.

[19] On the placing of blame on the insurance company, I find this less than acceptable. The notes to defendant which accompanied the claim form and particulars of claim which were served on the defendant make it pellucid what the consequences are of not acknowledging service and filing a defence within the period identified on the documents. Although the defendant provided these documents to Advantage

General within two days of being served, there is no evidence that he followed up with them. He says he genuinely believed that they were "taking care of the matter", but he does not say the basis on which he held that belief. His name is on the claim form and the particulars of claim. The consequences are his to bear if he does not act as the documents direct him. The notes to defendant were directed to him. As Sykes J (as he then was) said in **Sasha Gay Saunders v Michael Green, Wendell Hart, Arman While and Michael Bailey, Claim No 2005 HCV 2868, unreported Supreme Court decision decided on February 27, 2007**; placing the blame on insurers who do not timeously act upon the claim form and particulars of claim they receive, is no excuse at all. I therefore find that the defendant did not apply to set aside the default judgment as soon as reasonably practicable.

Has the defendant provided a good explanation for failing to file an acknowledgement of service and a defence within the time stipulated by the CPR?

[20] The defendant was served with the originating documents on April 12, 2021 and took them to his insurers two days later. As I observed in relation to the defendant's evidence applicable to CPR 13.3(2)(a) considerations, blaming the insurers is no excuse at all. My observations in relation to those considerations apply equally to the considerations under CPR 13.3(2)(b). Besides saying that he took the documents to his insurers within two days of receiving them and genuinely believing that they would deal with the matter, no evidence was offered by the defendant to explain why a defence was not filed within 42 days of service. The defendant has not said he followed up with the insurers and they have not filed any evidence to either corroborate his, or to explain their own conduct. I therefore find that he has not provided any good explanation for the delay.

The overriding objective and prejudice

[21] I have a duty to ensure that I treat the application before me justly. That is the mandate of the CPR's overriding objective. I have no difficulty finding that although the proposed defence is one that is more than arguable, the considerations of CPR 13.3(2) (a) and (b) within the context of the evidence, compel me to refuse the

defendant's application. Counsel Miss Butler argued that there really is no prejudice that will befall the claimant should the application be granted, save for a 'mere inconvenience" of not getting the immediate fruits of his judgment. But that is not a mere inconvenience. The decided cases remind us that a default judgment is a thing of value. A judgment creditor who suffers delays in benefiting from the fruits of his judgment is prejudiced. In my view this is self-evident. Besides, the accident occurred in August 2020. A trial date may be sometime in the distant future. I am aware that we are now setting trial dates in the year 2026. By then memories may have faded. The claimant may be challenged in getting witnesses. On the other hand, I am cognisant of the fact that the defendant will have to face an award of damages and miss the opportunity to defend the claim. But considering all the factors in the round, including the defendant's delays and the dearth of evidence provided by him to explain them, I am satisfied that the just outcome of this application is to refuse it.

[22] Counsel Miss Butler mentioned in her written submissions that there is a related case arising from the same accident in which the defendant is being sued by another claimant and that he is seeking to join Lloyd Mase as an ancillary defendant. She said concerns surrounding the possibility of inconsistent judgments should be a basis on which I allow the defendant to defend this claim. She also posited that it is in the interest of the administration of justice that this possibility does not occur. I cannot agree with counsel. There is already a default judgment in this case by which the defendant is liable to the claimant. The allegations on which some other claimant is suing the defendant (the facts of which were not put in evidence before me), cannot be a sound basis for me to grant the application to set aside the default judgment considering the principles in CPR 13.3 and the long line of decided cases applying and interpreting them.

Conclusion

[23] In the result I make the following orders:

a) The defendant's application to set aside the default judgment is

refused.

b) Costs to the claimant to be agreed or taxed.

A. Jarrett
Puisne Judge (Ag.)