JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

SUIT NO. C.L. 1994 R 166

BETWEEN	ADOLPHUS SYLVESTER ROPER	CLAIMANT
AND	KINGSTON HUB DISTRIBUTORS LIMITED	1ST DEFENDANT
AND	DAVID WATSON	2ND DEFENDANT
AND	IAN GOULBOURNE	3RD DEFENDANT

Miss L. Green, instructed by Forsythe & Forsythe, for the Claimant.

Mr. H. Haughton Gayle for the 2nd Defendant.

Heard: 10th and 18th February 2005.

MANGATAL J:

1. This is an application by the Second Defendant seeking an order to set aside the final judgment entered on the 31st day of May 2002 and an order for a new trial of this personal injury motor claim. The Second Defendant also seeks an order granting permission to file and serve out of time an amended Defence pleading mechanical latent defect and what his Attorney-at-Law has termed inevitable accident. This accident happened nearly 12 years ago; it occurred on the 17th of May 1993.

2. On the 11th of March 1999 the Claimant discontinued the Suit against the First Defendant. It does not appear as if the Third Defendant was ever served. An

Appearance and a Defence were filed by the Second Defendant's original Attorney-at-Law on the 11th October 1994 and the 16th February 1995 respectively. It is that Defence which arose for consideration in answer to the Claimant's Claim on the 31st May 2002 when the matter was fixed for trial. The Second Defendant did not attend Court on the trial date.

3. On the 31st May 2002 the trial judge entered a final judgment against the Second Defendant. The judge was satisfied of service of notice of the trial on the Second Defendant by an Affidavit of Service sworn to on the 18th of April 2002 by one Donna Griffin, a legal clerk employed to the Claimant's Attorney-at-Law. In this Affidavit it was indicated that on the 4th of April 2002 the Second Defendant was sent notice of the trial by registered mail at his address as stated in the Writ of Summons. Miss Griffin went on to say that the registered letter and notice were not returned. There was also admission of service on the Second Defendant's then Attorney-at Law on the 4th of April 2002. The Attorney-at-Law obtained an order removing his name from the record on the 8th April 2002, but it is not clear whether all the steps required to perfect the removal from the record as set out in the then applicable Judicature Civil Procedure Code were carried out. Service on the Attorney would technically constitute proper service on the Second Defendant, in addition to the service effected by registered mail.

4. A number of rules of the Civil Procedure Code 2002 arise for consideration. Part 39 deals with trials and Rule 39.6 states:

> *(1) A party who was not present at a trial at which judgment was given or an order made in its absence may apply to set aside*

that judgment or order.

(2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.

(3) The application to set aside the judgment or order must be supported by evidence on Affidavit showing-

(a) a good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended some other judgment or order might have been given or made.

5. Part 20 deals with amendments to statements of case . Rule 20.4(1) and (2) states:

(1) An application for permission to amend a statement of case may be made at the case management conference.

(2) The court may not give permission to amend a statement of case after the first case management conference unless the party wishing to make the amendment can satisfy the court that the amendment is necessary because of some change in the circumstances which became known after the date of that case management conference.

6. Part 13 of the Civil Procedure Rules deals with setting aside or varying a default judgment. However, those provisions are not in my view applicable here as there was an appearance and a defence filed.

7. At the time when the judgment was entered the relevant rule for setting aside would have been section 354 of the Judicature (Civil Procedure Code) Law , which provides:

Any verdict or judgment obtained where any party does not appear at the trial may be set aside by the Court or a judge upon such terms as may seem fit, upon an application made within ten days after the trial.

8. The application was supported by an Affidavit sworn to by the Second Defendant on the 10th December 2004. Essentially, the Second Defendant is saying that he was served with the Writ of Summons in 1994. He went to his original Attorney-at-law . The Attorney assured the Second Defendant that as he was not on the scene at the time when the accident took place he could not be held responsible for it. The Second Defendant says that as a result of the assurance given to him by the Attorney he concluded that that was the end of the matter as far as the claim against him was concerned. It was not until a bailiff in November 2004 informed him that the judgment had been entered against him that he realized that the suit was alive and that he had been deemed culpable by the court. He says that shortly after he received the assurance from the Attorney he innocently changed his home address and did not think it necessary to inform the Attorney of the change of address since he had from day one given the Attorney his business address, at which, up to now, he may still be contacted. The Second Defendant has not expressly said that he received no notification of the trial date. However, in so far as he has said that he changed his address and that on retrieving his file from his Attorney-at-law he saw where letters sent to him at his former home address as stated in the Writ were returned unclaimed, I understand the Second Defendant to be saying that he did not know of the trial date.

9. The Second Defendant claims that he took the driver of the motor vehicle to the Attorney not long after being served with the Writ but that thereafter, the Attorney asked him to bring in the Third Defendant to see him. At that later time the Second Defendant searched in vain for the Third Defendant and received information that he had migrated.

10. The Defence which was filed on behalf of the Second Defendant was in reality no

defence at all. The Defence admitted that the driver the Third Defendant was the agent of the Second Defendant but stated that the Second Defendant made no admission as to how the accident happened and stated that the Second Defendant was not at the scene of the accident and therefore is unable to give any details about the accident. An owner or person for whose purposes a motor vehicle is being operated cannot escape vicarious liability for the negligent driving of his servant or agent on the basis that he the principal was not at the scene or present in the vehicle when the accident happened.

11. The defence which the Second Defendant now seeks the Court's leave to raise for the first time is a defence of mechanical defect, based on observations which the Second Defendant now for the first time is claiming to have made of the truck in question at the scene after the accident. This is a strange turn of events, particularly since in the defence filed it was merely pleaded on his behalf that the Second Defendant was not at the scene of the accident. In addition to his own alleged findings, the Second Defendant would now be seeking to rely on what he was told by the driver as to the manner in which the accident happened, including the allegation that the steering became loose and uncontrollable. The driver on the Second Defendant's own account has migrated and is by inference not available to give evidence.

12. The damages awarded at the trial and in respect of which the Second Defendant must have received the frightening news from the bailiff in November 2004 , are close to four million dollars.

13. In my view, the rules set out in Part 39 are applicable and not section 354 of the Civil Procedure Code. Although the judgment was entered at a time when the Judicature (Civil Procedure) Code was applicable, the applications to set aside and to amend are governed by the C.P.R (Part 20 in the case of the application to amend).

14. I am not sure whether, or for that matter, when the judgment or order was served on the Second Defendant. Without more, I am prepared to accept that the application to set aside is within time and that the second Defendant has proceeded with alacrity in that regard. However, the Second Defendant changed his address without telling his Attorney-at-Law. This was the address stated for the Second Defendant on the Writ. Whether the Attorney also had a work address for him or not, and this has not been confirmed or denied in any Affidavit by the Attorney-at-Law, the Second Defendant failed to give the Attorney his new home address at his peril. The only way that the Claimant's Attorneys would have been able to learn of a new address would have been through the Defendant's Attorney-at-Law. Indeed, quite often the only reason that lawyers representing a litigant attend the hearing of an application by other Attorneys to remove their names from the record as appearing for an party, is to see if they can obtain the last known address for that party. The only other way for the Claimant to effect service on the Claimant is through the Attorney-at-Law on the record whose address is the party's appointed address for service. In my view the explanation advanced cannot constitute a good reason for failing to attend at the hearing. In addition, parties are expected to stay in touch with their Attorneys when they have been sued. The scope therefore for them to say that they were unaware of a court date must by its nature be very limited. Also, bad advice from a lawyer or assumptions by the Second Defendant

that the matter was at an end, based on that bad advice, are also not a good reason for the failure to attend or to stay on top of what is essentially one's own business. That is really an end of the matter since in Rule 39.6(3) the court must be provided with evidence both of a good reason for failing to attend the hearing as well as that it is likely that had the applicant attended some other judgment might have been made. The Second Defendant's application cannot therefore get off the ground. There is no residual discretion to set aside the judgment if one of these factors is missing.

15. However, in any event, it is clear to me that in this case the Second Defendant has also failed to provide evidence that had he attended, it is likely that some other judgment or order might have been given or made. Unfortunately, the Defence which was before the trial judge was quite a hopeless one, with no prospects of succeeding. I am therefore far from convinced that, had the Second Defendant attended the trial, the result would have been any different.

16. As regards the question of amending, it is clear that the rules do not contemplate amendment after a case management conference is held, much less after a final judgment has already been entered nearly 3 years ago. In addition, the facts outlined here do not amount to a change of circumstance as envisioned by the rules.

17. It seems to me that sub-paragraph(b) of Rule 39.6(3) i.e. that the Defendant must show that it is likely that had the applicant attended some other judgment or order might have been given or made means that the Defendant must show that he would have had a real prospect of successfully defending the claim and is tantamount to being the same test

set out in Rule 13.3. The word "might" waters down the use of the word "likely", and converts the likelihood to a prospect. They are differently phrased simply because of the different factors which lead to judgment being entered. Neither on the Defence as pleaded, nor on the amendment sought, would the Defendant have had a real prospect of successfully defending the claim, given the position taken originally and the steps involved in proving this defence some nearly 12 years later. This Court must take into account the practical reality that the driver is not available to give what would have been vital evidence in respect of the proposed late and monumental amendment. The Second Defendant is seeking to rely on his own alleged expertise as a mechanic and there is no independent evidence being put forward in support of the proposed amendment. Where the Defence of Latent Defect is raised, the burden would be on the Defendant to prove it. All told, this means that the Second Defendant cannot satisfy me that had he attended court on the trial date the outcome might have been different.

18. In addition, it would clearly be prejudicial for the Claimant to have such a defence being raised at this stage for the very first time. It would in my judgment be totally out of keeping with the overriding objective set out in part 1 of the C.P.R., of dealing with cases justly, in particular ensuring that cases are dealt with expeditiously and fairly, if I were to grant the amendment sought. Whilst a court cannot have regard to the overriding objective so as to change the plain meaning of a rule, the overriding objective must always be borne in mind in exercising any discretion given to the Court by the Rules or in interpreting any rule.

19. Accordingly, notice of application for court orders dated 16th December 2004 is dismissed, with costs to the Claimant to be taxed if not agreed or otherwise ascertained.