NMLJ

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2005 HCV 2868

BETWEEN	SASHA-GAYE SAUNDERS	CLAIMANT
AND	MICHAEL GREEN	FIRST DEFENDANT
AND	WENDEL HART	SECOND DEFENDANT
AND	ARMAN WHITE	THIRD DEFENDANT
AND	MICHAEL BAILEY	FOURTH DEFENDANT

IN CHAMBERS
Duane Thomas instructed by Thomas and Company for the claimant
Kadia Wilson instructed by Taylor, Deacon and James for the second defendant

February 8, 12 and 27, 2007
APPLICATION TO SET ASIDE JUDGMENT, RULE 13.3 OF THE CIVIL PROCEDURE RULES

SYKES J.

1. This is an application by Mr. Wendel Hart, the second defendant, to set aside a default judgment that was properly entered against him. He failed to file an acknowledgment of service as well as a defence within the required time and there was no extension of time. Judgment was entered against him on March 27, 2006.

2. This is the background to the entry of judgment. On February 10, 2005, Miss Saunders, a young lady of nineteen years and on the threshold of adulthood was a passenger in a public passenger vehicle, namely, a Toyota Coaster Motor Bus bearing registration number PB 5837 driven by Mr. Michael Green, the first defendant. Mr. Hart is the owner and operator of the bus. The bus collided with a motor car, bearing registration number 5995 DG, driven by Mr. Michael Bailey, the fourth defendant, and owned by Mr. Arman White, the third defendant. Judgment was entered against the fourth defendant as well.

3. The accident occurred on 2E Main Road in Greater Portmore, in the vicinity of an intersection. It is agreed that the motor car drove from the minor road on to the road in which the bus was travelling. During the case management conferences held since last year, Miss Saunders and Mr. Bailey, the driver of the car, have maintained that Mr. Green the driver of the bus was speeding. Miss Saunders goes further and alleges that he was racing with another bus; travelling at high speeds with the door open and on impact she was thrown from the bus, through the open door and received serious injuries. Mr. Green has denied all of these allegations.

He says he was travelling within the speed limit, with the door closed and it was the car that struck his vehicle and caused it to overturn, thereby causing the injury to Miss Saunders. Mr. Hart was not at the scene of the accident and from his proposed defence he is simply relying on Mr. Green's proposed evidence.

4. Miss Saunders' right arm has been badly injured. I have been advised that the neurological damage is so severe that modern surgical techniques can do very little for her.

5. Mr. Hart's liability is derivative, that is, his liability depends on whether Mr. Green is found liable at the trial to come. There is no independent basis of liability. This fact has played a large part in my decision to set aside the judgment. I now turn to the applicable law.

The affidavit evidence

6. Mr. Carlton Manning, a process server swore in an affidavit that he personally served Mr. Wendell Hart at 7 Hampton Crescent, Kingston 3, in the parish of St. Andrew on February 5, 2006, at 3:30pm. Mr. Hart was not known to him before but he (Hart) acknowledged that he was Mr. Hart and accepted service.

7. Mr. Hart, in an affidavit dated October 5, 2006, in support of an application to set aside judgment, claims that he was not served with the claim form and particulars of claim but they came to his attention on February 8, 2006. He said that after he was aware of the claim form and particulars of claim he filed an acknowledgment of service on March 29, 2006.

8. He filed a second affidavit on November 3, 2006, in which he says that his place of abode is 305 5 West, Greater Portmore, St. Catherine but his mailing address in 7 Leithrim Avenue, Vineyard Town, Kingston 3. This address is quite different from that at which the process server said that he served Mr. Hart. 7 Leithrim Avenue, according to Mr. Hart, is the address of his mother. According to him, he got the documents and took them to N.E.M. Insurance Company ("NEM") three days after he became aware of them. This would be February 11, 2006. He does not say why he took them to NEM three days later. He says that he was told by Mr. Joseph Murray, an officer at NEM, that the documents were mislaid and this resulted in the acknowledgment of service being filed on March 29, 2006. He adds that the acknowledgment of service should have been filed by February 22, 2006, and the defence by March 22, 2006. This is not so, the acknowledgment should have been filed by February 19, 2006.

9. I observe that in none of the applications for setting aside the judgment was it never a ground that Mr. Hart was not served. It was not in the original application filed on October 6, 2006, and neither was it a ground in the amended application filed November 3, 2006. It does seem odd that a litigant who has a ground that

would, if established, secure the result he desires chooses a more difficult route. Non-service goes to the root of any judgment obtained in default of acknowledgment of service or defence. If judgment was obtained in such circumstances, it would have to be set aside as of right. Why rely on a discretionary power when the more direct and obvious one is available? This conduct is more consistent with the assertion by the process server that Mr. Hart was served personally. I therefore find that Mr. Hart was served at the time, place and manner indicated by the process server.

10. Mr. Hart is seeking to absolve himself of any responsibility by placing all the blame on NEM. This is no excuse at all. Mr. Hart is the person sued. It is his servant or agent who is alleged to have committed a tort. Mr. Hart has a responsibility to see that he complies with the court procedures. The documents that accompany the claim form and particulars of claim are in the plainest of language. It spells out the consequences of failure to file an acknowledgment of service or a defence. There is no evidence that Mr. Hart is illiterate or has any comprehension difficulties.

11. Mr. Hart has failed to indicate what communication he had with NEM between February 8, 2007, when he claims he got the claim form and particulars of claim and the date of judgment was entered. There is no evidence that he was in consistent contact with NEM or Mr. Murray to prompt them to act. In my view, Mr. Hart received the documents and did nothing much after that. As is customary, it is the knowledge that judgment has been entered that brings him to court.

12. There is credible evidence showing that NEM was told of the proceedings from as early as September 2005, when a notice of proceedings was served on them by the claimant's former attorneys. The claimant has done all required of her. She had Mr. Hart and the insurers properly served with the requisite documents.

13. Mr. Hart said in his affidavit filed November 3, 2006, that he was not served with the claimant's change of attorney. That is not true because it was sent by registered post to his address at which he was served, namely, 7 Hampton Crescent, Kingston 3. Proof of this was furnished by the registered slip dated March 17, 2006. There is no evidence that the registered article was returned unclaimed.

14. Mr. Hart adds that he did not know of the interlocutory judgment entered against him until October 3, 2006. According to him NEM had instructed the firm of Taylor, Deacon and James to appear for him by virtue of its subrogation rights under the contract of insurance. If I understand Mr. Hart, he knows nothing, did nothing because NEM was doing everything. If this is the position then NEM's knowledge must be his knowledge. There is no evidence that NEM did not know of the judgment in default of acknowledgement of service. I therefore conclude that

Mr. Hart knew of the judgment from at least the first case management conference held on August 4, 2006. Mr. Hart was represented by counsel at the case management conference held on July 13, 2006. Mr. Hart's position is that the attorney was there at the behest of NEM which was exercising its subrogation rights. The implicit argument being that the attorney did not represent him. That is unacceptable. As far as I am concerned Mr. Hart was properly represented by counsel and counsel's knowledge is his knowledge. Using August 4, 2006, as the date of knowledge, the application to set aside was made quite late. The time lapse between August 4, 2006, and October 6, 2006, is too long to be ignored. In the modern era of civil litigation where there is much emphasis on speed and efficiency, that time lapse is inordinate. It is reflective of a culture of lassitude and sluggishness, the implacable enemies of the new ethos propounded by the new rules.

15. The defence relied on by Mr. Hart is that Mr. Green was not negligent and if he was not negligent then Mr. Hart cannot be liable. He adds that there is still time to meet the trial date if the defence were allowed to come in at this stage and since there still has to be a trial in respect of the liability of Mr. Green, he should have the judgment set aside. I now turn to the law.

The amended rule 13.3 of the Civil Procedure Rules

16. Shortly after the Civil Procedure Rules ("CPR") a number of cases came before the courts on this question of setting aside judgments properly obtained. The then rule 13.3 was framed as follows:

> *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.*

17. This provision was consistently interpreted by the Judges of the Supreme Court to mean that all conditions stated in three conditions had to be met before the discretion to set aside the judgment could be set aside. This interpretation was confirmed by the Court of Appeal in ***Ken Sales & Marketing Ltd v James & Company (A firm)*** SCCA No. 3/05 (delivered December 20, 2005), Harrison P.

emphasized the defects of the past and welcomed the new approach at pages 5 - 6. The President accepted that these rules were to be interpreted more strictly than the previous law on setting aside. This rule was in response to the complaint that there was wholesale disregard of procedural rules by counsel and litigant. It was felt that the stringent new standard would produce greater alacrity on the part of litigants. The message was getting through and there was a small but perceptible change in litigation culture and we were heading in the right direction.

18. There were complaints about the stringency with which the rules were being interpreted. The argument that won the day was that there was the risk of injustice to some deserving litigant.

19. The response of the Rules Committee was to enact a new rule 13.3 which relaxes the law. Rule 13.3 now reads:

> *(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 the 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.*

20. This new rule no longer has the strict gate keeping provisions as the previous rule 13.3. The lethargic litigant has been given new vigour to continue his old ways. Happily, the Committee did not embrace the liberality of the English rule on this point. The English rule 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 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.

21. The English rule provides two grounds for setting aside default judgments properly obtained. These two grounds are independent of each other. The first is whether there is a real prospect of success. The second is whether there is some other good reason. The rule then indicates that the court should consider whether the party has acted promptly. By contrast, the new rule in Jamaica has only one ground and that is whether there is a real prospect of successfully defending the claim. I need to point this out because the change in the rule has led to the erroneous view that we are back in the bad old days of litigation when the defendant could apply even at the eleventh hour to have the judgment set aside and the only question would be whether he had a good defence on the merits.

22. In the new rule 13.3 the sole question is whether there is a real prospect of successfully defending the claim. This test of real prospect of successfully defending the claim is certainly higher than the test of an arguable defence (see ***ED&F Man Liquid Products v Patel & ANR*** [2003] C.P. Rep 51). Real prospect does not mean some prospect. Real prospect is not blind or misguided exuberance. It is open to the court, where available, to look at contemporaneous documents and other material to see if the prospect is real. The court pointed out that while a mini-trial was not to be conducted that did not mean that a defendant was free to make any assertion and the judge must accept it. This, in my view, is good sense and good logic. Lord Justice Potter said at paragraph 10:

However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable...

23. This passage should be noted with great care. It is clearly suggesting that the judge must conduct some evaluation of the proposed defence and decide whether it has a real prospect of success. If the defence has substantial contradictions then that may be an indication that the prospect of success is not real. In another case, documentary evidence may make it very difficult for the defence to succeed. So too may expert evidence. Thus in spite of the greater relaxation of the rules it would be grave mistake to think that a defendant, without much thought, can simply cobble a defence and all will be well.

24. I should also point out that rule 13.3 (2) says that the court must consider the factor set out in that paragraph. This would suggest that in the absence of some explanation for the failure to file the acknowledgment of service or the defence, the prospect of successfully setting aside a properly obtained judgment should diminish some what. Similarly, if the application is quite late, then that would have a negative impact of successfully setting aside the judgment. This approach is consistent with recognising that a claimant who has properly secured judgment has something of great value. This value in Jamaica is enhanced by the certain knowledge that a successful application to set aside judgment translates into a twenty four month to forty eight month wait for the trial to take place. In that time the claimant bears the risk of losing witnesses and evidence might not be available at the date of trial. During that time he has to incur the costs of retaining counsel. There is the stress and anxiety of waiting for the trial.

25. Rule 13.3 does not set out the criteria to be used when deciding to set aside a judgment properly obtained. Rule 13.3 (2) refers to two factors that must be considered but these factor do not and could not represent all the factors to be considered. In the absence of any stated criteria, I have to go back to rules 1.1 (2) and 1.2. The former requires, inter alia, that I have regard to saving of expense, ensuring that the case is dealt with expeditiously and fairly and consumes its appropriate share of resources. The latter requires that I seek to give effect to the overriding objective when interpreting or exercising any power under the rules.

26. There is a discussion in the case I am about to cite that is helpful to the resolution of the case before me. That is the case of ***Salfraz Hussain v. Birmingham City Council, Coral George Coulson, Governors of Small Heath Grant Maintained School*** [2005] EWCA Civ 1570 (delivered February 25, 2005). In that case, the claimant sued a number of defendants after falling from a window of a building in which he was attending martial arts classes. Judgment was entered against one of the defendants who defaulted by not filing an acknowledgment of service or defence. The particular defendant applied to have judgment set aside. The Court of Appeal accepted that he did not act promptly in applying to set aside the judgment but he did have a defence that had a real prospect of success. The court found that had the default judgment stood the trial court would still have to explore issues had the defendant participated. In other words, his non-participation did not relieve the court from exploring factual issues which involved that particular defendant. The Court of Appeal distinguished the situation before the court from that in which a single defendant was sued and a judgment in default of either acknowledgment of service or defence would mean that there would be no trial if the judgment stands. Lord Justice Chadwick said at paragraph 36:

But it must be kept in mind that discretionary powers are to not to be exercised in order to punish a party for incompetence -- they must be exercised in order to further the overriding objective.

27. I conclude from the decision, that in cases where there are multiple defendants and a default judgment has been entered against one and that judgment does not relieve the court, at any subsequent trial, from exploring issues directly involving that particular defendant, the court should favourably consider any application to set aside judgment provided this can be done without serious risk of injustice to the claimant. The risk of injustice to the claimant must be considered because justice cannot be for the defendant alone or for one party. The court should also consider whether conditions ought to be imposed to minimise any harm to the claimant if there is such a risk. I have deliberately stated the principle this narrowly since any wider statement may receive the unwanted warm embrace of the dilatory and slothful litigant.

28. This decision of the English Court of Appeal is consistent with my view of how the rule ought to be applied. The application of the rule to any given set of facts requires that the overriding objective be kept in view and the judge must make a serious effort to ensure justice between the litigants.

Application to facts

29. There are a number of factors to be acknowledged. In this particular case, Mr. Green and Mr. White have filed defences and a trail date has been set for October 29, 30 and 31, 2008. The issue at trial involves the issue of whether Mr. Green was negligent. If he was not, then there is no liability in the defendant against whom judgment has been entered. The claimant has already received an interim payment in excess of JA$4,500,000.00. Mr. Bailey has not sought to set aside judgment although he has appeared at the case management conference held on July 13, 2006. Mr. Bailey admitted his negligence. He said that he thought he could have crossed the road on which the bus was travelling before it came to where he was. In that assessment, he was mistaken. The defence of Mr. Arman White is that Mr. Bailey was not his servant or agent at the time of the accident.

30. I have also considered the explanation advanced by Mr. Hart for the delay in applying to have the judgment set aside as well has his explanation for the failure to file an acknowledgement of service and defence. I find the explanations unsatisfactory and had there been an independent basis of liability I would not have set aside the judgment but the circumstance here compels me to do so.

31. The position is that only Mr. Green is contesting the way in which the accident occurred. Since that is the case, then it would seem that Mr. Hart ought to be permitted to defend the claim since it cannot be said that Mr. Green's defence has no reasonable prospect of success. Therefore it cannot be said that Mr. Hart's

defence has no real prospect of success. Mr. Hart's liability is contingent on Mr. Green's and there can be no injustice to the claimant if the judgment is set aside. I say this because, the practice in circumstances like this is to await the trial at which time damages are assessed as part of the trial. It is for these reasons I have decided to set aside the judgment and permit the defence filed on March 29, 2007, to stand. Costs of $40,000.00 to the claimant to be paid on or before March 15, 2007.