IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2004 HCV 00990

BETWEEN	GEORGE STEPHENSON	CLAIMANT
A N D	DALVESTER SMITH	DEFENDANT

Miss Catherine Minto instructed by Nunes Scholefield DeLeon & Co. for Plaintiff.

Mrs. Suzette Campbell instructed by Campbell and Campbell for Defendant.

PRACTICE AND PROCEDURE-
APPLICATION TO SET ASIDE JUDGMENT IN DEFAULT OF ACKNOWLEDGEMENT OF SERVICE-
WHETHER DEFENCE HAS A REAL PROSPECT OF SUCCESS

3RD, 5TH and 11th April 2006

BROOKS, J.

There is more to this case than initially meets the eye. In his Particulars of Claim filed in this action Mr. George Stephenson avers that Mr. Dalvester Smith's motor vehicle struck Mr. Stephenson while the latter was a pedestrian, and that the incident arose out of Mr. Smith's negligence as he drove that vehicle. It seems however that the incident, which took place on 14th November, 2002 was more than mere happenstance. The two men were in fact two of the sides of a love triangle, and the event took place outside the home of the lady attracting their attention.

On 10th November, 2003 in the Circuit Court for the parish of Trelawny, Mr. Smith pleaded Guilty to the offence of Inflicting Grievous Bodily Harm with Intent. The offence was committed on the 14th November, 2002, and the victim was Mr. George Stephenson.

It is alleged that Mr. Stephenson suffered fractures of the bones of the left leg arising from the event. He later filed this claim against Mr. Smith to recover damages due to Mr. Smith's negligence. A default judgment was in due course entered and the document later served on Mr. Smith. In this application to set aside the judgment Mr. Smith requests that the case be allowed to proceed to trial because he was not at all negligent.

The main issue to be determined here is whether, in light of his plea of guilty and conviction for the offence of inflicting harm to Mr. Stephenson, Mr. Smith's proposed defence has any real prospect of success.

Rule 13.3 of the Civil Procedure Rules 2002 governs the mode of considering this application. It states:

> **Cases where court may set aside or vary default judgment**
> 13.3. (1) 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.

It is well established that the applicant must satisfy all three limbs of the rule. See *Caribbean Depot Ltd. v. International Seasoning & Spice Ltd.* (unreported, SCCA 48/2004 delivered 7/6/04). It is therefore necessary to consider each aspect, and I shall do so, each in turn.

Has the application been made as soon as is reasonably practicable?

The default judgment was served on Mr. Smith on 30th April, 2005. This application to set aside that judgment was filed on 30th May. Miss Minto, on behalf of Mr. Smith, submitted that Mr. Smith fails on this limb because he has given no reason as to why a whole month elapsed before he applied to set aside the judgment. He has, in fact, not given a reason. Mrs. Campbell, on his behalf, submitted that the month is not unduly long.

It is true that in *Sydney Malcolm v. Metropolitan Management Transport Holdings Limited and anor.* Mangatal J. (Ag,) as she then was, on this aspect of rule 13.3 (1) said:

> "The period of delay between the entry of the default judgment and the filing of the application to set aside is less than 2 months, which I do not consider inordinate and which do not cause excessive prejudice to the Plaintiff".

That, with respect, however, is not the test; it is whether the application was made "as soon as reasonably practicable" after being apprised of the entry of the judgment. This requires an explanation from the applicant or someone on the applicant's behalf, as to what was, or was not

done, in respect of making the application. In this case Mr. Smith is in effect asking the court to infer that the test has been satisfied. I am prepared to draw that inference in light of the fact that it is his insurer through whom Mr. Smith seeks to defend this action. There is evidence of communication by letter from the insurer. I therefore find that that is an explanation for the delay and that the one month was not unreasonable in the circumstances.

Has the applicant given a good explanation for the failure to file the acknowledgement of service in time?

The Claim Form and Particulars of Claim herein were served on Mr. Smith on 22nd May, 2004. His explanation for the failure to file the acknowledgement of service in time is that he received "some legal documents" from the process server and that he delivered them to the insurer's Montego Bay office for them to arrange legal representation for him. Miss Minto pointed out that this was Mr. Smith's second explanation and that his first was an untruthful assertion that he had not been served with the Claim Form. She submitted that, not only should the untruth be held against him but that the absence of evidence from a representative of the insurer, as to what had transpired with the Claim Form, prevented the test in rule 13.3 (1) (b) from being satisfied.

Mr. Smith's explanation is that "it is only since receiving the (judgment) documents in April 2005 that I became aware that an attorney

had not been appointed to represent me". I find that it is a good one in the circumstances.

Has the applicant a real prospect of successfully defending the claim?

In his affidavit in support of this application, sworn to on 20th June, 2005, Mr. Smith deposed that when he got to the lady's home, he saw Mr. Stephenson advancing toward him "using expletives and making threatening gestures at me". He continued by saying that he "began driving away...when Mr. Stephenson stepped off the sidewalk where he was now standing and came out into the road in the path of my car. I swerved to my left to avoid hitting him and continued driving away." He deposed that it was only afterward that he learned that the car had hit Mr. Stephenson.

Mrs. Campbell submitted that if those facts were established at a trial then there is a real prospect of his successfully defending the claim. She went further to say that using the test enunciated in *Swain v. Hillman and anor.* [2001] 1 All ER 91, this is not a fanciful defence.

In confronting the issue of the plea of guilty, Mrs. Campbell submitted that a conviction for a criminal offence is not evidence of negligence in a civil suit. She relied on the authority of *Hollington v. F. Hewthorn and Company Ltd.* [1943] 1 K.B. 587. In that case the court ruled

that evidence of the conviction in a criminal court is not admissible in civil proceedings. In giving its reasons the court stated (at pp. 594-5):

> "In truth, that conviction is only proof that another court considered that the defendant was guilty of careless driving. Even were it proved that it was the accident that led to the prosecution, the conviction proves no more than what has just been stated. The court which has to try this claim for damages knows nothing of the evidence that was before the criminal court. It cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision. Moreover, the issue in the criminal proceedings is not identical with that raised in the claim for damages."

Their Lordships stated that "both on principle and authority", evidence of a conviction would not be admissible in a subsequent civil trial.

In seeking to apply those principles to the instant case Mrs. Campbell submitted that "we don't know if it is the same negligence or recklessness which gives rise to this accident".

I agree with Miss Minto, that the plea of guilty distinguishes the instant case from that just examined. I cannot agree that *Hollington* prevents me considering the plea of guilty, as opposed to the conviction, at this stage. This is not a case where a link needs to be made, by some external evidence as to the incidents in both cases being the same. Mr. Smith pleaded guilty to injuring Mr. George Stephenson on the 14th November, 2002, the same date which is pleaded in this claim. It is true that in his affidavit Mr. Smith deposes that "I had been involved in a previous confrontation with Mr. Stephenson", but I find that it would be stretching the limits of credibility to breaking point ask this court to believe that it was some other confrontation

which gave rise to the criminal proceedings. Further, it is important to note that the onus is on Mr. Smith at this stage to show that his defence has a real prospect of success. I find that in entering a plea of guilty, Mr. Smith's present allegation that Mr. Stephenson stepped into the path of his car, that he swerved to avoid him and that he did not know that Stephenson was hit, cannot be believed, and would not be believed at a trial of the issues of fact.

Conclusion

In this application to set aside the default judgment, Mr. Smith is obliged to satisfy all the elements of rule 13.3 to enable the court to exercise its discretion to allow him to defend this claim. I find that Mr. Smith's previous plea of guilty to inflicting grievous bodily harm to George Stephenson seriously undermines Mr. Smith's credibility in the defence which he seeks to advance in this case. I therefore find that he has no real prospect of successfully defending the claim and his application must fail.

The order therefore is as follows:

1. The application to set aside the Default Judgment entered herein on 21st December, 2004 is hereby refused.
2. Costs to the Claimant to be taxed if not agreed.
3. The costs are to be paid before any new application by the Defendant will be considered.