



[2023] JMSC Civ. 241

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2015 HCV 04424

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|----------------|--|---------------------------------|
| BETWEEN | TIMOTHY WATSON | CLAIMANT |
| AND | RORY DALEY JUNIOR (PERSONAL Rep. Ad Litem for the Estate of Rory Daley) | 1st DEFENDANT |
| AND | DEVON GREEN | 2ND DEFENDANT |
| AND | VADEN GORDON | 3RD DEFENDANT |

IN CHAMBERS

December 5 and 20, 2023

Ms. Georgia Hamilton instructed by Mesdames Georgia Hamilton & Co for the Claimant

Ms. Faith Gordon instructed by Messrs. Samuda & Johnson for the 3rd Defendant

Ms. Jacqueline Cummings instructed by Mesdames Archer Cummings & Co observing the proceedings.

Civil Procedure – Application to Set Aside Default Judgment – Whether or not the 3rd Defendant was Properly Served – Whether or Not Deemed Service pursuant to an Order for Service by a Specified Method under Rule 5.14 was Rebutted – Whether Proven that Advertisements in Newspaper Came to 3rd Defendant’s Attention.

D. STAPLE J (Ag)

BACKGROUND

- [1] The 3rd Defendant has entered the fray rather late in the day in an attempt to stave off enforcement proceedings being taken against him to give effect to a Judgment of the Court entered against him by default of failing to file an acknowledgment of service or a defence.
- [2] His primary bone of contention is that he was never served with the Claim Form and Particulars of Claim nor did such documents come to his attention nor were they likely to have come to his attention at all.
- [3] The Claimant, keen on keeping the fruits of his judgment, has resisted the application from the 3rd Defendant on the basis that the 3rd Defendant was validly served, he has no defence with a real prospect of success or, even if he did have a defence with such prospects, he took too long to apply to set aside the default judgment.
- [4] The Court read and heard submissions from the parties on the matter. The Court is grateful to Ms. Gordon and Ms. Hamilton for the thoroughness of their preparations.
- [5] Having examined the Application keenly, however, in my view it comes down to a simple question of whether the 3rd Defendant was validly served.

ISSUES

- [6] The fundamental question to be resolved is whether or not I am satisfied, on the balance of probabilities, that the Claimant, in complying with the Order for service by a specified method, would have brought the claim to the attention of the 3rd Defendant.
- [7] If I am so satisfied, I must then decide whether or not the judgment could be set aside in my discretion under Rule 13.3.

[8] There was heavy discussion about service by registered post. However, when I perused the Order for Service by Specified Method that was made by Master Miss R. Harris on the 25th October 2016, it was apparent that the service of the Claim Form and Particulars of Claim was to be done by the specified method of advertisements in the Daily Observer. Order 3 of those orders said,

“That the Claimant is permitted to effect service of process on the Defendants by Notice of Proceedings by way of two (2) advertisements, one week (1) apart in the Daily Observer. Notice of Proceedings to be settled by the Registrar.”

[9] Service by registered post only applied to service of “all further process for service” as per Order 5.

[10] In those circumstances, all discussions about service relative to service by Registered Post are of no moment as it concerns the question of service of the Claim Form and Particulars of Claim.

THE LAWS OF SERVICE

[11] The Court is empowered, on an application by a party, to order that service of the Claim Form and Particulars of Claim on an individual be effected by means of a specified method of service. This would be in substitution for personal service which is the usual prescribed method.

[12] This power is given to the Court by virtue of CPR Rule 5.14. I will set out rule 5.14.

5.14 (1) The court may direct that service of a claim form by a method specified in the court’s order be deemed to be good service.

(2) An application for an order to serve by a specified method may be made without notice but must be supported by evidence on affidavit –

(a) specifying the method of service proposed; and

(b) showing that that method of service is likely to enable the person to be served to ascertain the contents of the claim form and particulars of claim.

- [13] The effect of making an order for service by a specified method is that once the Claimant complies with the order for service by the specified method, the Claim Form and Particulars of Claim are **deemed** (emphasis mine) served.
- [14] *Yvonne Virgo v Granvin Graham et al*¹ makes the point very well. In that case, the Appellant/Claimant had been injured in a motor vehicle collision and filed a Claim against the 1st Respondent and others. During the course of the proceedings, she sought and obtained permission to substitute personal service of the commencement documents on the 1st Respondent and on the 2nd Respondent via registered post at their respective addresses of Toll Gate and Gimme-me-Bit respectively in Clarendon.
- [15] Having purportedly complied with the Order for service by specified method, the Appellant then proceeded to obtain judgment in default against the two Defendants and the matter proceeded to an Assessment of Damages where final judgment was entered for the Appellant.
- [16] The Insurer for the 1st and 2nd Respondents applied to intervene in the proceedings under the rights of subrogation and applied to have the judgment in default and all subsequent proceedings set aside. Tie Powell J granted their application and set aside the Default Judgment and all subsequent proceedings on the basis that service by registered post was proven to have been ineffective in bringing the claim to the attention of the Respondents as
- a. The mails had been returned to the Claimant by the post office; and
 - b. The addresses on the post slip were too vague and generic to allow for the Court to be satisfied, when service was challenged, that it was likely that the fact of the registered articles were to be collected at the post office came to the attention of the Defendants.

¹ [2023] JMCA Civ 31

[17] The Appellant appealed the decision to the Court of Appeal. The appeal was unanimously refused by the panel. P. Williams JA, in delivering the decision of the panel was of the view that the learned Judge was correct in her position that the service was ineffectual as a question of fact and that the Defendants had successfully rebutted the deeming provision.

[18] At paragraphs 62 and 63 of the Judgment, P. Williams JA had this to say concerning service by a specified method:

[62] Where a court makes an order for service by registered mail, the authorities have established that proving that the documents have been sent to the address that counsel provided to the court as being that of the intended recipient is not the end of the matter. See *Annette Giscombe and ors v Halvard Howe and anor* at para [69]. **Deemed service can be rebutted** (emphasis mine). Rebutting the presumption does not mean that the order for specified service has been set aside or declared invalid. Rather, rebutting the presumption involves demonstrating to the court *that although the documents were sent by registered mail, the evidence shows that the intended recipient did not receive the notice, and, as a consequence, was not put in a position to ascertain the contents of the documents that were sent* (emphasis mine).

[63] Contrary to the appellant's submissions, there is no basis in law to differentiate between service by registered post in the context of specified service, as against service by registered post in what counsel described as "regular service". Where required, the court examines the circumstances before it to determine whether deemed service is rebutted whether the registered mail was sent to a company or to an individual. Non-delivery of the registered mail can, but will not always be seen as, rebutting the presumption of deemed service. This is reflected in the provisions of rule 5.14 which require the applicant for an order to serve documents by a specified manner to show "that that method of service is likely to enable the person to be served to ascertain the contents" of the originating documents. Implicit in the wording of the rule is the fact that there is no presumption that the mode of service will in fact enable the person to be served to ascertain the contents of the originating documents. In my view, ground (j) should also fail in light of the above discussion of the issue.

[19] In similar vein to service by registered post is any other method of specified service. Service is a matter of law and fact. It does not mean that the Order for

specified service is invalid. The effect is a deeming provision only and it is always subject to evidence to the contrary.

OBTAINING DEFAULT JUDGMENT

[20] The rules relating to the obtaining of default judgment are found under Part 12 of the Civil Procedure Rules.

[21] A Default Judgment may be obtained where there has been proved service of the Claim Form and Particulars of Claim, but there has been no acknowledgment of service within the time limited for filing the acknowledgment of service, or no defence filed within the time limited for filing the defence as the case might be.

[22] To obtain default judgment under rule 12.4, a Claimant must prove the following:

- a. Service of the Claim Form and Particulars of Claim on the Defendant using an approved method;
- b. That the time for filing an acknowledgment of service or defence (as the case might be) has passed.
- c. That they are entitled to the remedy sought in the Particulars of Claim.

2 Once the default judgment is entered, liability is conclusive².

THE EVIDENCE OF SERVICE

[23] The Claimant must first satisfy me that it was more likely than not that he had complied with Order 3 of Master R. Harris. This they did by dint of the Affidavit of Georgia Hamilton filed on the 10th February 2017 exhibiting the relevant tear

² See the case of *Blagrove v Metropolitan Management Transport Holdings Ltd et al* (Unreported) SCCA 111/05, Court of Appeal, Jamaica, December 10, 2006.

sheets from the Daily Observer showing the publication of the approved Notice of Proceedings on the 22nd and 29th December 2016.

[24] Having so done, the Claimant has complied with the rule 5.15. The Claim Form and Particulars of Claim are therefore **deemed** served as at the 29th December 2016. The Judgment in Default entered against the 3rd Defendant is therefore *prima facie* regularly entered.

[25] It would now be for the 3rd Defendant to rebut the deeming provision by providing evidence to show that he was not notified of the Claim nor did the Claim likely come to his attention by that method of service.

[26] The uncontroverted evidence from the 3rd Defendant, as given in his Affidavit filed on the 9th November 2022 at paragraphs 15 and 16, is that the Claims did not come to his attention until sometime after March 2019 when a representative from his insurer told him that service of the Claim was done by publication in the newspaper. In addition, specifically at paragraph 16, his uncontroverted evidence was that he does not read the newspaper and has not done so for years. He says he receives his news by social media.

[27] I accept the evidence of the 3rd Defendant in this regard. I am satisfied that the fact of the Claim being published in the newspaper did not come to his attention until after March 2019. There is no evidence from anyone to contradict this assertion. The 3rd Defendant was not cross-examined nor invited to be cross-examined. I have, therefore, no reason to reject his evidence. In this event, by the time the service through the publication of the Notice in the paper had come to his attention, the validity of the pleadings for service would have long expired. So this could not be valid service.

[28] The 3rd Defendant also says, without contradiction, and I accept, that he does not read the paper and had not done so for years. But the Court makes the additional observation about service by publication in the newspaper that it is fraught with risk and the evidence to support an assertion that it is likely that publication in the

newspaper is likely to bring the claim to the attention of a Defendant has to be of cogent quality.

[29] The evidence should, in my view, at least show the following:

- a. That the intended recipient of the notice is literate or that person(s) who are likely to bring the notice to his attention are literate;
- b. That the intended recipient reads the actual publication in which the notification will be published or that the person(s) who are likely to bring the notice to the intended recipient's attention read the actual publication;
- c. That the intended recipient or the person(s) who are likely to bring the notice to his attention actually read the section of the publication in which the notice will be published (this is significant as even though a person might read the publication, they are not likely to read the section where the legal notices are placed. Not everyone reads the newspaper in such a granular manner);
- d. In this modern era, that the notification is published in a version of the publication that is likely to come to the attention of the intended recipient or a person(s) who is likely to bring it to the attention of the recipient (this is because there are now apps and web pages of publications that are viewed by readers that **do not include** the legal notices section or it is not readily accessible);
- e. That the notification itself is of such prominence that it would be inescapable from the attention of the intended recipient or the person(s) who are likely to bring the notice to his attention.

[30] In the absence of this evidence, one runs a high risk of the notice of the Claim being missed by the intended recipient.

[31] In this case, I am satisfied that the 3rd Defendant has rebutted the deeming of service of the Claim Form and Particulars on him through the publication in the Daily Observer. I am satisfied that that notice never came to his attention prior to

the entry of the judgment in default against him. I am satisfied therefore that the judgment in default was irregularly obtained as the Claimant has not satisfied me of service as required by rule 12.4(a).

CONCLUSION

[32] In light of my findings above, I am not satisfied that it is more likely than not that the Defendant was served with the Claim Form, Particulars of Claim and other supporting documents.

[33] In the circumstances therefore the 3rd Defendant's application for setting aside of the default judgment as of right is granted.

DISPOSITION

- 1 The 3rd Defendant's Application for Court Orders filed on the 9th November 2022 (as amended) is granted and all subsequent proceedings set aside.
- 2 Costs to the 3rd Defendant to be taxed if not agreed.
- 3 3rd Defendant's Attorneys-at-Law to prepare file and serve this Order on or before the 29th December 2023 by 3:00 pm and served by 4:00 pm.

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Dale Staple
Puisne Judge (Ag)