[2021] **JMSC Civ 159**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018 HCV 00806

BETWEEN	**SHELDON WILLIAMS**	**CLAIMANT**
AND	**DENESE DURRANT**	**DEFENDANT**

IN CHAMBERS

Jason Jones instructed by Jason Jones Legal for the Claimant.

Miguel Palmer for the Defendant.

Application to set aside default judgment obtained for failure to serve claim - expiry of claim form prior to purported date of service - issue not raised by the defendant - whether court entitled to set aside on its own motion. Conflicting evidence as to service - whether defendant was served - whether default judgment should be set aside.

HEARD: 27th May, 17th June and 29th July 2021

MASTER C. THOMAS (Ag)

[1] By Notice of Application to Set Aside Default Judgment filed on 9th February 2021 the defendant seeks the following orders:

1. *The interlocutory judgment entered against the Defendant herein and all subsequent proceedings be set aside.*
2. *The Defendant's time for filing this application is extended.*

3. *The Defendant's time for filing an Acknowledgment of Service is extended.*
4. *Acknowledgment of Service filed on the 09th February 2021 is permitted to stand.*
5. *The Claimant's claim against the Defendant is statute-barred.*
6. *In the alternative, the Defendant is permitted to file a Defence herein within twenty-one (21) days of the date hereof.*
7. *Costs to the defendant*
8. *Such further and/or other relief as this Honourable Court may deem just.*

[2] The grounds relied on in support of the application are as follows:

1. *The Defendant has a good explanation for the failure to file an Acknowledgment of Service or Defence in this matter as the Defendant was not served with the Clam Form and Particulars of Claim.*

2. *The delay in the filing of the Acknowledgment of Service or Defence was not intentional.*

3. *The Claimant's claim is statute barred.*

4. *The Defendant applied to set aside the judgment as soon as reasonably practicable after finding out that the judgment had been entered.*

5. *Had the Defendant been served with the claim documents, she would have defended the matter as she has a real prospect of success pursuant to Rule 13.3(1) of the Civil Procedure Rules. As it stands she has been deprived of the opportunity to do so.*

6. The granting of the orders sought will lead to a just determination of this matter.

[3] The claim arose out of an accident which occurred on 14th September 2014 in the parish of St Catherine between the claimant who was driving his motorcycle and the defendant who was driving a Suzuki Grand Vitara motor vehicle. On 27th February 2018, the instant claim was filed seeking damages for negligence. It was alleged that the defendant was negligent in that she had lost control of her vehicle and veered into the path of the claimant causing a collision and injury to the claimant.

[4] On 15th January 2019, the claimant filed an affidavit of service in which Mohan Escoffery, a process server, deponed that he had served the particulars of claim, claim form, prescribed notes to the defendant, acknowledgment of service form, application to pay by monthly instalments and a defence form on the claimant at Coveralene District, Above Rocks in the parish of St Catherine on 3rd January 2019 at 4:11pm. Default judgment for failure to file an acknowledgment of service was entered on 25th January 2019 and the matter was set for an assessment of damages hearing.

[5] The defendant's application filed on 9th February 2021 was supported by the Affidavit of Denese Durrant in Support of Notice of Application for Court Orders. In her affidavit, the defendant outlined her account of the accident in which she asserted that the claimant came on to her side of the road as he was "trying to go around dirt and debris that the rain had washed down on his side of the road and he collided into the right rear side of my vehicle". She asserted that if the claimant had stayed on his side of the road, the accident could have been avoided or the results could have been different. She stated that it was on 18th January 2021 that she received a telephone call from Miguel Palmer, attorney-at-law at the Insurance Company of the West Indies, advising her of the default judgment. Of immense importance is paragraph 5 of the affidavit, which I have reproduced below:

> I deny that I was served as alleged or at all. I do not know Mr. Escoffery and I was never served with any court documents. Also, I have never lived at Coveralene District, Above Rocks, St Catherine, but I live at Cavaliers District in the parish of St Andrew.

[6] As a result of the variance in the accounts of Mr. Escoffery and the defendant, an order was made for both affiants to attend for cross-examination. Pursuant to that order, cross-examination of both Mr. Escoffery and Ms Durrant occurred on 17th June 2021.

[7] Subsequent to the cross-examination, I identified an issue that was not raised in the defendant's application, but which I felt was of such gravity that it could not be ignored by the court. The issue arose from the fact that the claim was filed in February 2018 but service of the claim as alleged by Mr. Escoffery was in January 2019. I therefore invited the parties to file submissions on whether the court ought to set aside the default judgment on the basis that the claim had expired prior to its alleged service. Submissions were received on behalf of the defendant but none were received on behalf of the claimant. However, on the morning of the date set for delivery of judgment, prior to the delivery of the judgment, counsel for the claimant indicated that though the claimant still maintained his position that the defendant had been served, in light of the provisions of the Civil Procedure Rules and the authorities, it was conceded that claim form had expired and thus there were no submissions that could usefully be advanced.

Discussion

[8] In the light of the issue identified by the court and the orders being sought in the application as well as the grounds relied on, the following issues arise for determination:

(i) Whether the defendant was required to file an acknowledgment of service in order to apply to set aside the default judgment.

(ii) Whether the court ought to set aside the default judgment on the basis that the claim form had expired prior to its purported date of service and was therefore invalid.

(iii) Whether, if the claim form is valid, the defendant was served with the claim form, particulars of claim and prescribed accompanying documents;

(iv) Whether, if the defendant, was served, she has a real prospect of successfully defending the claim;

Issue (i)

Whether the defendant was required to file an acknowledgment of service in order to apply to set aside the default judgment.

[9] I am of the view that this issue need not detain me in light of the judgment of the Court of Appeal in **Frank I Lee Distributors Ltd v Mullings & Co (A Firm); Mullings & Co v Frank I Lee Distributors Ltd** [2016] JMCA Civ 9. In that case, judgment had been obtained by Mullings & Co (A Firm) against Frank I Lee Distributors in default of acknowledgment of service. Frank I Lee had contended in its application to set aside default judgment that it had never been properly served; hence its failure to file an acknowledgement of service. A preliminary objection was raised at the hearing of the application to set aside that the application should not be heard since no acknowledgment of service had been filed and therefore the application was a nullity. The judge at first instance acceded to the preliminary objection and held that an acknowledgment of service was a mandatory requirement in civil proceedings pursuant to rule 9.2(1) of the Civil Procedure Rules (CPR). However, he declined to find that the application to set aside was a nullity. Both findings were challenged on appeal.

[10] P. Williams JA (Ag) (as she then was), with whom the other judges of appeal agreed, stated:

[40] It is evident that the service of the claim form is what must dictate the filing of an acknowledgment of service of that form. Furthermore, the rule specifically states, an acknowledgement of service may be filed before the request for default judgment. The rules contain no requirement for the filing of an acknowledgement of service after the default judgment has been entered. Any acknowledgment of service filed thereafter would be invalid because it would have been filed out of time and without any legal basis to do so.

[41] The position is that after judgment has been entered, a defendant can no longer defend the claim unless the judgment is set aside and the court grants leave to defend. So a defendant who is asserting that he was never served with the claim form and wishes to have the default judgment set aside will have to make an application pursuant to CPR 13.4.

[42] CPR 13.4, already noted at paragraph [15], sets out the procedure for applications to vary or set aside a default judgment. There is no mandatory requirement expressed in those provisions that an acknowledgment of service is required in making the application to set the judgment aside. In fact, the rule specifically states that "an application may be made by any person who is directly affected by the entry of the judgment". This provision is wide enough to encompass persons who are not defendants to the claim. Those persons could not be required to file an acknowledgment of service as the rules pertinent to acknowledgment of service would not apply to them. Had the framers of the rules intended that defendants should be treated differently from other affected persons for the purposes of an application to set aside a default judgment, then specific provisions would have been

made in relation to them and a provision made that they should file an acknowledgment of service as a condition-precedent. This is absent from the CPR. There is, therefore, no need or basis to import such a requirement into the rules.

[11] Later in her judgment, she stated:

"… the requirement to file an acknowledgment of service is mandatory for any defendant who has been served and who wishes to dispute the claim or dispute the court's jurisdiction pursuant to CPR 9.2(1). Although this requirement is mandatory, a party who is able to satisfy the conditions set out in the CPR, may still be able to have a default judgment entered due to his failure to adhere to this requirement set aside and his matter considered on its merits. However, there is no such mandatory requirement for Frank I Lee, as a defendant, who alleges that it has not been served and wishes to have a default judgment entered against it for that failure, set aside."

[12] In light of her findings on the circumstances in which there is a requirement to file an acknowledgment of service before applying to set aside a default judgment, the learned judge of appeal declined to make any findings on whether the application was a nullity as that issue had become redundant.

[13] Therefore, the defendant in this case would only be required to file an affidavit of service if she were contending that she had been served and wished to dispute the claim or dispute the court's jurisdiction. It follows that any orders in relation to the filing of an acknowledgment of service would only be necessary if it is found that the claim was served on the defendant.

Issue (ii)

Whether the court ought to set aside the default judgment on the basis that the claim form had expired prior to its purported date of service and was therefore invalid.

[14] Mr. Palmer on behalf of the defendant made reference to rule 8.14(1) of the Civil Procedure Rules (CPR) pointing out that prior to 15th January 2018, this rule had read as follows:

> *The general rule is that a claim form must be served within 12 months after the date when the claim was issued or the claim form ceases to be valid.*

The rule was then amended to read:

> *The general rule is that a claim form must be served within 6 months after the date when the claim was issued or the claim form ceases to be valid.*

M. Palmer submitted that as of the 15th January 2018 the validity of the claim form had been shortened and therefore what obtains is that the claim form issued by the court remains valid only if it is served within six months after the date of issuance unless the claimant had sought the court's permission for the validity of the claim form to be extended pursuant to rule 8.15 of the CPR. In these circumstances where the claimant had not obtained an order pursuant to rule 8.15, the claim form had ceased to be valid approximately 4 months and 6 days before it was allegedly served on the defendant.

[15] Mr. Palmer is indeed correct that by the amendment to rule 8.14 of the CPR which took effect on 15th January 2018, the period for service of the claim form and ultimately the life of the claim form has been shortened to six months. Rule 8.15 of the CPR provides for the claimant to obtain an extension of the period by filing an application prior to the expiry of the six-month period. The claim, which was filed on 27th February 2018, was therefore subject to the amended rule 8.14 of the CPR,

which would have required service of the claim form, the prescribed accompanying documents and the particulars of claim by 26th August 2018 unless an order extending the period for the service of the claim form or the validity of the claim form was made by 26th August 2018. It is common knowledge that no extension of the claim form was sought. Therefore, as at the date of service of the claim as asserted by Mr. Escoffery in his affidavit, the claim form had expired. In **Rayan Hunter v Shantell Richards and Stephanie Richards** [2020] JMCA Civ 17, McDonald Bishop JA, in considering the effect of a claim form served after its expiry stated:

> *It means then that in our rules, once the claim form has expired, an application cannot be made after its expiration to extend time for it to be served or to renew it. An expired claim form, without there being in place an order extending it (as in this case), ceases to be valid.*

[16] That case concerned rule 8.14 of the CPR prior to its amendment in January of 2018. In that case, the claim forms had been served after 12 months and in circumstances in which no extension had been sought. The defendant filed an acknowledgment of service and an application seeking to set aside service of the claim. The appeal against the first instance judge's refusal to set aside the application was allowed. McDonald-Bishop JA at paragraph [46] stated:

> *… the expired claim forms in this case were null and void and of no legal effect for all purposes, including service on the appellant. It is settled law that while an irregularity can be waived, a nullity cannot be: see* ***The Gneizo; Owners of the Motor Vessel Popi Owners of Steamship or Vessel Gneizo*** *[1967] 2 All ER 738.*

[17] It follows from the above dictum that the situation that existed as at 3rd January 2019 was that the claim form filed on 27th February 2018 had expired. It had ceased to exist and could not be revived or resurrected. As a consequence, it was

a nullity. Therefore, there could have been no valid service of this claim on 3rd January 2019. I am of the view that regardless of whether the defendant had sought to set aside the default judgment on this basis, I am entitled to find that there was no service of the claim form on the defendant and that the default judgment ought to be set aside as of right pursuant to rule 13.2 of the CPR on the basis that one of the conditions of rule 12.4 of the CPR, being service of the claim had not been satisfied. I am of the view also that given rule 13.2(2) of the CPR, I am entitled to so find regardless of whether the defendant had raised the issue in her application. In the circumstances, I find that the default judgment should be set aside under rule 13.2 of the CPR as of right. This is sufficient to dispose of the application. However, I will go on to consider the third issue.

Whether, if the claim form is valid, the defendant was served with the claim form, particulars of claim and prescribed accompanying documents;

[18] As indicated previously, the evidence of Mr. Escoffery in his affidavit filed on 15th January 2019 was that he had served the defendant at Coveralene District, Above Rocks in the parish of St Catherine. He was permitted to amplify his evidence and in examination in chief stated that the name of the place had been spelt incorrectly and it should have been corrected from Coveralene to Cavaliers as Cavaliers was the place where he effected service on the defendant. He went on to state that on reaching the community, he asked a gentleman who said that he did not know Coveralene District and that it must be Cavaliers District. Mr. Escoffery also stated that he had located the defendant by getting directions from a gentleman in the community who had directed him to her address and that he had served her at her home. He stated further that at the defendant's house, he blew his horn and a lady came out, of whom he enquired whether she was Denese Durrant, to which she responded "Yes". He described the claimant's house as being one of three houses on a property and that one of the houses had a green and yellow painting. Upon being asked by his counsel to identify the defendant whom he had served, Mr. Escoffery pointed to the defendant in court as the person whom he had served.

[19] Under cross-examination, he stated that he was familiar with Above Rocks and when asked if he was familiar with Coveralene District, he insisted that this was a mistake. When counsel for the defendant attempted to ascertain the name of the community he had arrived at when he spoke to the gentleman who informed him of the error in the name of the district and how he got to Cavaliers District, Mr. Escoffery insisted that he was already in Cavaliers District when he spoke to the gentleman. When he was asked the reason for his failure to point out that he had served the defendant in Cavaliers District, Mr. Escoffery's explanation was that he had forgotten.

[20] The defendant gave evidence that she is a nurse who works at the Kingston Public Hospital. She stated that she has lived in Cavaliers District for 20 years and that she has lived at her current place of residence for 8 years. She stated that Cavaliers District is about 7 miles or 25-30 minutes by vehicle from Above Rocks. She also stated that there were three houses on the property where she resided and that her house is yellow with pink around the windows. Two houses had been on the property until about two years ago when construction of the third one had commenced. She also stated that she had changed the colour of her house last year.

[21] Under cross-examination, the defendant stated that she is a nurse and that her hours of work are not constant. Her hours of work were determined by a shift system and this would vary and that if she was not at work, she would be at home. She stated that she was able to recall the 1st day of January 2018 as it was her birthday and she did not attend work. She remembered what occurred on 3rd January 2018 as the Matron at her place of work had called her about the department leave which she had forgotten to apply for in respect of the day when she was absent. She was, however, unable to recall what occurred on 3rd January 2019 and admitted that she could not say what occurred as she was unable to remember.

[22] This issue requires the court to consider the totality of the evidence to determine whether the defendant was served. The defendant cast doubt on the evidence of Mr. Escoffery that he had served her at Coveralene District in Above Rocks by her assertion in her affidavit that she has never lived at Coveralene District and by her further evidence in court that she has lived in Cavaliers District in St Andrew for the past twenty years. There was no challenge to this aspect of her evidence and therefore no dispute that the defendant lived at this address at the time of the purported/alleged service of the claim on her.

[23] The focus of Mr. Escoffery's evidence was to convince the court that Coveralene District, which had been included in his affidavit as the address for service was a mistake, and that he had served the defendant at Cavaliers District. It is notable that Coveralene District was the district which had been included in the claim form as the address of the defendant and this was accordingly the information given to Mr. Escoffery by the claimant's attorney. Having started out with that erroneous name, Mr. Escoffery ought to have provided an explanation as to how he got to Cavaliers District. He stated that a man had informed him of the error in the name of the place; however, based on his evidence in cross-examination, this conversation with the man took place when he was already at Cavaliers District. In my view, he failed to provide a satisfactory explanation as to how he arrived at Cavaliers District in the parish of St Andrew, he having set out to find Coveralene District, the latter district being located in Above Rocks in a different parish. It is true that the evidence of the defendant was that Cavaliers District was some 25 minutes away from Above Rocks by vehicle, but given that there is no evidence as to the existence of Coveralene District, Mr. Escoffery ought to have supplied an explanation as to how he first arrived in Cavaliers District when he had had an erroneous address to begin with.

[24] It is also significant that though there had been a mistake in the name of the district, in reporting to the claimant's attorney that he had served the defendant, Mr. Escoffery failed to mention this error. It seems to me that it is unlikely that such an essential detail would have been forgotten by Mr. Escoffery if he had in fact served

the defendant at that address, particularly so since the place of service was required for the purpose of proving service. His evidence was that he had been a process server since 2008; therefore, he would have been quite aware of the process involved in service and the requirement for the swearing of an affidavit in proof of service. It is very unlikely that Mr. Escoffery would have forgotten such an important detail and equally unlikely that had he forgotten to tell the claimant's attorney of the significant error in the address, that he would forgotten same when he was required to swear to the affidavit particularly having regard to his evidence that he had read the affidavit before signing. In the light of the foregoing, I do not find Mr. Escoffery to be a witness of truth.

[25] I am of the view that no weight ought to be given to Mr. Escoffery's identification of the defendant in court. This is so given that he did not supply a description of her in his affidavit. Also, he had stated in his affidavit that he had not known the defendant before and when asked why he would be able to recognize the defendant, he was not able to point to any distinguishing feature that would have assisted him in remembering her. Significantly, at the time of Mr. Escoffery's identification of the defendant, she was wearing a mask that covered her face except for her eyes and was the only person in court other than the attorneys-at-law for both parties.

[26] In the circumstances, I find that on the totality of the evidence, Mr. Escoffery's evidence as to his service of the claim on the defendant is not credible. I am of the view that in light of this finding, it is unnecessary to consider whether the defendant has a real prospect of successfully defending the claim.

[27] In conclusion, I find that the claimant was not served with the claim form as there was no valid claim that could be served, the claim form having expired on 26th August 2018 and consequently, it was a nullity at the time it was served. In addition, even if the claim form had not been rendered invalid, the claimant has failed to provide credible evidence to satisfy me that the defendant was served. Therefore, I make the following orders:

1. The interlocutory judgment in default of acknowledgment of service entered against the defendant herein and all subsequent proceedings are set aside.

2. Costs to the defendant to be agreed or taxed.