[2016] JMSC Civ 147

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 04692

BETWEEN	**KIMALEY PRINCE**	**CLAIMANT/RESPONDENT**
AND	**GIBSON TRADING & AUTOMOTIVE LIMITED (GTA)**	**DEFENDANT/APPLICANT**

Mr. Richard O'Gilvie instructed by Nigel Jones & Co. for the claimant/Respondent

Ms. Samoya Young instructed by Clough Long & Co. for the defendant/Applicant

IN CHAMBERS

Heard: 28th April and 15th September 2016

Civil Procedure Rules 2002 – Part 13 – Rule 13.3 (as amended 2006) – Rule 13.4 – Failure to file acknowledgement of service – Application to set aside default judgment – Procedure – Affidavit of Merit – Alternative application to strike out the claim for failure to include the certificate of value

MCDONALD J

Background and Chronology

[1] The claimant, an Air Conditioning Technician, instituted a claim against the defendant, a limited liability company in the business of selling tools and servicing automotive equipment, on the 1st of October 2015.

[2] The claimant is seeking damages for negligence and/or breach of statutory and contractual duty arising out of an accident which occurred on the 27th of October 2014.

The claimant alleges that the said accident took place while he was assisting to unload the defendant's bus, at which time a platform slid and crushed his hand. It should be noted that at the time of the accident the claimant was employed to the defendant.

[3] The claimant has included in his Claim, particulars of negligence and/or breach or duty and has also indicated that he intends to rely on the doctrine of *res ipsa loquitur.* Further, the claimant is also claiming the sum of Three Hundred and Fifty Thousand Dollars ($350,000.00) which represents ten (10) month's wages for the time which the claimant was unable to work.

[4] There is some dispute as to when the Claim Form and Particulars of Claim were served. The claimant alleges that they were served on the Managing Director of the defendant Company (Mr. Ian Gibson) on the 2nd of October 2015, whereas the defendant alleges that they were delivered to the Company on or about the 5th of October 2015. In any event, no acknowledgment of service was filed by the defendant within fourteen (14) days of either date and on the 22nd of October 2015 an Interlocutory Judgment in Default of acknowledgment of service ('default judgment') was entered.

[5] A sealed copy of the default judgment was attached to a letter from the claimant's Attorney-at-Law dated the 5th of January 2016 which the claimant alleges was served on the 6th of January 2016 and the defendant claims it received on the 11th of January 2016.

[6] A Notice of Application for Court Orders together with an Affidavit in Support with a draft Defence attached was filed by the defendant on the 28th of January 2016. This is the Application to which this judgment now refers.

The Instant Application/Orders sought

[7] Pursuant to the Notice of Application for Court Orders filed on the 28th of January 2016, the defendant is seeking the following:

1. *That the Interlocutory Judgment in Default of acknowledgment of service of Claim Form entered on the*

22nd day of October 2015 in Judgment Binder No. 756 Folio No. 491 be set aside;

2. *That the defendant's draft Defence attached to the Affidavit of Ian Gibson in Support of the Notice of Application filed on the 28th day of January 2016 be allowed to stand,*

   Alternatively, that the defendant be granted leave to file its Defence within fourteen (14) days of the grant of the Order;

3. *In the alternative, that the claimant's Claim be struck out; and*

4. *Costs to the defendant.*

Application to Set Aside the Interlocutory Judgment in Default ('default judgment')

[8] The default judgment was obtained pursuant to rule 12.4 which sets out the conditions to be satisfied where a judgment for failure to file acknowledgment of service is sought. Therefore in hearing and determining the instant Application, the Court must have regard to rules 13.3 (as amended) and 13.4. Both are set out below –

Cases where court may set aside or vary default judgment

13.3 (1) *The court may set aside or vary a judgement [sic] 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 this 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.

Applications to vary or set aside judgment – procedure

13.4 (1) An application may be made by any person who is directly affected by the entry of judgment.

(2) The application must be supported by evidence on affidavit.

(3) The affidavit must exhibit a draft of the proposed defence.

[9] The considerations to which the court must have regard in exercising its discretion to set aside a regularly obtained default judgment are explicitly set out in rule 13.3 (supra). It is clear that the paramount consideration is whether the defendant has a real prospect of successfully defending the claim. Also relevant is the length of delay in making the application and the explanation proffered by the defendant for its failure.

[10] In addition to weighing these considerations, the court must ensure that there has been adherence to the procedure for making such an application, as set out in rule 13.4 (supra).

A. *Whether the application has been made by a person directly affected by the entry of judgment*

[11] It is clear that there is no issue with regards to locus standi. There has been compliance with rule 13.4(1); insofar that the application to set aside the default

judgment is being made by Mr. Ian Gibson, who is a director of the defendant company and by all accounts is a "person who is directly affected by the entry of judgment."

B. *Whether the application has been supported by evidence on affidavit which exhibits a draft of the proposed defence*

[12] Prima facie, it appears that there has been compliance with rules 13.4 (2) and (3) also. An affidavit sworn to by Mr. Ian Gibson was filed on the 28th of January 2016 and exhibited thereto as **"I.G.1"** is a draft of the proposed defence. However upon a perusal of Mr. Gibson's affidavit it does not appear that rule 13.4(2) has been satisfied. Rule 13.4(2), (set out above) requires that an application to set aside a default judgment "must be supported by evidence on affidavit".

Mr. Gibson's affidavit

[13] Mr. Gibson is the only affiant for the defendant and therefore his affidavit contains all the evidence on which the defendant seeks to rely in support of its application. In his affidavit, Mr. Gibson swears to the following –

i. His address;

ii. That the facts within his knowledge are true and where they are not within his personal knowledge are true to the best of his information and belief;

iii. His occupation and his capacity as a Director of the defendant company which authorises him to swear to the affidavit;

iv. The date in which the claim was instituted and the date of the incident which gave rise to the claim;

v. Service on the registered office on the 5th of October 2015;

vi. That he was travelling for business and only became aware of the claim on the 28th of December 2015 when he returned to office;

vii. The nature of the defendant's business and that he is required to travel frequently and be away from the registered office;

viii. That he first became aware of the default judgment on the 11th of January 2016 and immediately sought an Attorney-at-Law;

ix. That he contacted his current Attorneys-at-Law on the 14th of January 2016 and provided them with documents;

x. That he gave instructions to his Attorneys-at-Law;

xi. That he intends to defend the claim as he has a good defence on the merits;

xii. Advice from his Attorneys-at-Law to the effect that the court's permission is required to set aside the default judgment and to file a defence; and

xiii. That the defendant will be seriously prejudiced if the relief sought is not granted.

[14] Noticeably absent from Mr. Gibson's affidavit is any evidence with regards to the defence. It is noted that paragraph 12 of Mr. Gibson's affidavit (summarized at xi. above), merely states –

> *"That I intend to defend the claim as I have a good Defence on the merits. Attached hereto and marked as "I.G.1." for identification is a draft copy of the Defendant's Defence.*

[15] In resisting the application to set aside, Counsel for the claimant/respondent, Mr. O'Gilvie, submitted that Mr. Gibson's affidavit was not one of merit as it does not set out what is being relied on in the defence and it only attaches a proposed defence. Further, he submitted that the affiant (Mr. Gibson) cannot speak from his personal knowledge of the incident on the 27th of October 2014 which gave rise to the claim.

[16] In support of his submission, Mr. O'Gilvie commended to the court a substantial portion of the dicta of McDonald-Bishop J (as she then was) from **Joseph Nanco v**

Anthony Lugg and B&J Equipment Rental Limited [2012] JMSC Civil 81. Prior to setting out the quoted dicta, it is noted that on a procedural appeal, Morrison JA (as he then was) upheld the judgment of McDonald-Bishop J (see: **B&J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2) and I am guided accordingly by paragraphs [63] –[66] –

> *[63] By now, it is well known that the primary test for setting aside a default judgment regularly obtained is that the defendant must have a real prospect of successfully defending the claim rather than a fanciful one: (**Swain v Hillman and another** [2001] 1 All ER 91).*
>
> *[64] In evaluating whether the test has been satisfied, there must be shown a defence on the merits to that requisite standard. In **Furnival v Brooke** (1883) it was said (and I take it as being applicable today) that where the judgment is regular the court has a discretion in the matter and the defendant, as a rule, must show by affidavit that he has a defence to the action on the merits. Stuart Sime, in his text, **A Practical Approach to Civil Procedure**, 6th edition, p. 248, noted that the written evidence in support of the application to set aside will have to address, in particular, the alleged defence on the merit, the reason for not responding to the claim in time, and the explanation for any delay in making the application to set aside. This, of course, is in keeping with the prerequisites that must be satisfied pursuant to the rules.*
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> *[65] According to Craig Osbourn, (**Civil Litigation, Legal Practice Course Guides 2005-2006**, p. 365), the defendant must file evidence to persuade the court that there are serious issues which provide a real prospect of him successfully defending the claim. The evidence filed must set out the case in sufficient detail to satisfy the test.*
>
> *[66] It is with all this in mind that I have set out to examine the affidavit evidence filed in support of the application to see the substance and quality of the proposed defence. The evidence put forward in support of the application had prompted Mrs. Mayhew to argue that there is no affidavit of merit. The law is clear that the affidavit must contain the facts being relied on and that the draft defence should be exhibited. In **Evans v. Bartlam** [1937] A.C. 473, it was said that before a judgment regularly obtained could be set aside, an affidavit of merit was required and when the application is not so supported, it ought not to be granted except for*

> *some sufficient cause shown. I do note however, that Lord Atkins, at the same time, has stated that in rare but appropriate cases this requirement could be waived so as not to prevent the court from revoking its coercive powers. (emphasis added)*

[17] Counsel for the defendant/applicant, Ms. Young, responded to Mr. O'Gilivie's submission by placing reliance on the latter portion of McDonald-Bishop J's dicta at paragraph [66] (above).To this end, Ms. Young submitted that the requirement for an affidavit of merit may be waived so as not to prevent the court from revoking its coercive powers, she did however concede that this would only occur in rare cases. Further, Ms. Young cited paragraphs 73 and 74 of the judgment of Edwards J (as she then was) from **Victor Gayle v Jamaica Citrus Growers et al.** Claim No. 2008 HCV 05707 delivered on the 4th of April 2011 –

> *73. The oft quoted dictum of Lord Atkins in **Evans v Bartlam** (1937) 1 AC at page 65 outlines the policy underlying the court's discretion to set aside or vary a default judgment and suggests a guideline for the court when considering its draconian powers. In short, Lord Atkins suggested that a court must weigh the use of its coercive powers where there is a failure to follow any rule of procedure, against the need for the court to hear cases on the merits and pronounce judgment. This balancing exercise must take place against the background of the overriding objective.*
>
> *74. The learned judge in **Marcia Jarrett** quoted from the case of **C. Braxton Moncure v Doris Delisser** (1997) 34 JLR 432, judgment of Rattray, P in the Court of Appeal and I find it sufficiently compelling to repeat it here. In that case the President of the Court of Appeal as he then was said at page 425;*
>
> > ***"The court will not allow a default judgment to stand if there is a genuine desire of the defendant to contest the claim supported by the existence of some material upon which that defence can be founded."***

[18] Ms. Young completed her submission by stating that the defendant in the instant case has shown a clear and genuine desire to contest the claim and that a draft defence provides the material upon which a defence can be founded. Ms. Young urged the court

to accept the draft defence and affidavit of Mr. Ian Gibson and in light of her submission that there is a real prospect of successfully defending the claim and the overriding objective. She further submitted that justice would not be done if a default judgment was allowed to stand on a technicality.

[19] It should be noted however that the case of **Victor Gayle**, relied on by Ms. Young, wherein Edwards J set aside the default judgment, is quite dissimilar to the instant case. In **Victor Gayle**, the primary deficiency with the defendant's application related to the explanation put forward for failing to file an acknowledgement of service (per rule 13.3(2)(b)). The explanation was one in which Edwards J stated (at paragraph 78) that she could "vaguely sympathize". There was also some delay on the part of the defendant, which Edwards J did not find to be "so manifestly excessive". However the major difference was that the defendant in **Victor Gayle** complied with rule 13.4(2) by **supporting** its application with evidence on affidavit (sworn to by a Mr. John Thompson). Her Ladyship considered Mr. Thompson's affidavit to be an affidavit of merit (see: paragraphs 35 -37), as it duly set out the evidence on which the defendant relied and on which the court could properly rely on in finding that there was a real prospect of successfully defending the claim.

[20] Having considered the submissions by both Counsel, I am inclined to agree with the submissions by Mr. O'Gilivie that Mr. Gibson's affidavit does not provide sufficient evidence in support of the application and is not an affidavit of merit.

[21] Morrison JA succinctly dealt with the requirement for an affidavit of merit at paragraphs [43] and [47] of **B&J Equipment Rental Limited v Joseph Nanco** –

> *[43] The best known source of the requirement of an affidavit of merit on an application to set aside a judgment in default is* ***Evans v Bartlam*** *[1937] AC 473 ... In that case, Lord Atkin said (at page 480) that one of the rules laid down by the court for guidance in exercising the discretion to set aside a regularly obtained judgment in default is that "there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence". (emphasis added)*

> *[47] In the instant case, rule 13.3(1) required the appellant to show "a real prospect of successfully defending the claim". In my judgment in* ***Attorney General v McKay*** *(with which the other members of the court agreed), after referring to the* ***Evans v Bartlam*** *requirement that the affidavit of merit should be sufficient to demonstrate a "prima facie defence", I observed as follows (at para [23]):*
>
> > *"The language in the CPR is obviously stronger, with the result that, as Mr Stuart Sime puts it in 'A Practical Approach to Civil Procedure' (10th edn, para. 12.35), 'the written evidence in support of the application to set aside will have to address [the relevant] factors, and in particular the alleged defence on the merits'." (emphasis added)*

[22] Having regard to the foregoing, it is apparent that the affidavit of merit ought to disclose facts which constitute the defence and in my view this obligation is not met by exhibiting a draft of the proposed defence which is a separate requirement under rule 13.4(3).

[23] In the instant case, the defendant has failed to produce to the court evidence on affidavit that there is a prima facie defence and in particular has failed to set out the alleged defence on the merits. The effect of this is that the defendant's application to set aside the default judgment must fail. I am fortified in my view by reference to the **Commonwealth Caribbean Civil Procedure**, 3rd ed. at page 58, wherein the learned authors, Gilbert Kodilinye and Vanessa Kodilinye, opine –

> *It had been stated, on innumerable occasion in Commonwealth Caribbean courts under the RSC regime, that the absence of an affidavit of merit in support of an application to set aside a default judgment would normally be fatal to such application, and the practice of providing an affidavit of merit would be departed from only in rare cases. In view of the need under the CPR for the defendant to show not merely an arguable case but a real prospect of success, it seems that the affidavit of merit should be even more essential under the CPR regime. Indeed, Rule 13.4 specifically provides that an application to set aside a default judgment 'must*

> *be supported by evidence on affidavit', and the affidavit must exhibit a draft of the proposed defence.*
>
> *However, service of a defence alone is not sufficient, as a statement of case 'is not evidence'...*

Whether there is justification to waive the requirement for an affidavit of merit

[24] It is noted that while Ms. Young submitted that the requirement for an affidavit of merit may be waived she did however concede that this would only occur in rare cases. To this end, she did not make any submissions that there was anything to justify such a waiver or that this was an appropriate case for a departure from the usual requirement. The court is similarly unable to find any such justification.

[25] The court has considered the reasoning of Edwards J (as she then was) from **Victor Gayle** which was relied on by Ms. Young, and in particular the suggestion of Lord Atkins that there must be a balancing exercise which must take place against the background of the overriding objective.

[26] The court has also considered the defendant's desire to defend the claim and finds the dicta of Rattray P from ***C. Braxton Moncure v Doris Delisser*** particularly instructive -

> *"The court will not allow a default judgment to stand if there is a genuine desire of the defendant to contest the claim* ***supported by the existence of some material upon which that defence can be founded."*** *(emphasis added)*

In the instant case, there is no supporting material on which a defence can be founded and as such neither the overriding objective nor the defendant's seemingly genuine desire to defend the claim is sufficient. Rattray P made it clear that such a desire must be 'supported by the existence of some material upon which that defence can be founded'. I am therefore constrained to find that since Mr. Gibson's affidavit does not provide a basis for defending the claim and there are no exceptional circumstances to justify a waiver of the requirement or a departure from the rules, the defendant's application to set aside the default judgment must be refused.

Proposed Draft Defence and the rule 13.3(2) considerations

[27] In light my decision to refuse the application to set aside the default judgment on the basis that it was not properly supported by evidence (per rule 13.4(2)); it is unnecessary to engage in any discussion of the proposed draft defence. To borrow the words of Professor Kodilinye, "...a defence alone is not sufficient, as a statement of case 'is not evidence'."

[28] Since there is no evidence for the court to consider, I am unable to make a determination as to whether the defendant has a real prospect of successfully defending the claim (per rule 13.3(1)). It is therefore similarly unnecessary for the court to consider the length of delay in making the application to set aside default judgment or the whether the defendant has provided a good explanation for its failure to file an acknowledgement of service (per rule 13.3(2)(a) and (b)).

Alternative application to strike out the claimant's claim/ claimant's failure to include the certificate of value

[29] This Application rests on the fact that the claimant has failed to comply with rule 8.10, which states –

> *(1) In any claim in which-*
>
> *(a) the quantum of damages alone determines whether the claim should be brought in the court or the Resident Magistrate's Court; and*
>
> *(b) where the amount of any damages claimed is not specified, the claim form must include a certificate by the claimant that the damages claimed exceed the civil jurisdiction of the Resident Magistrate's Court.*
>
> *(2) The court may transfer any claim in which the amount claimed does not exceed the civil jurisdiction of the Resident Magistrate's court to that court.*

[30] Counsel for the claimant, Mr. O'Gilivie, in response to Ms. Young's application, submitted that the Applicant had made a determination that the quantum of damages would be within the limit of the Resident Magistrate's Court and that as far as he was aware the general damages awarded in claims for crush injuries typically exceed the limit of the Resident Magistrate's Court. He did express regret in not having any authorities in support.

[31] Mr. O'Gilvie also submitted that the claimant had at the time of the hearing, yet to receive the final medical report which would show the permanent partial disability which he submitted would be a factor in determining the quantum of damages to be awarded. Regrettably, Mr. O'Gilvie did not proffer any explanation for the omission, whether it was an oversight or due to inadvertence, nor did he indicate definitively that a certificate of value could be provided.

[32] I am mindful that this application was made in the alternative. In fact, Ms. Young spent considerably less time in advancing this application in her oral submissions. Notwithstanding that I am inclined to agree with Ms. Young's point that the claimant ought properly to have included the certificate of value (in compliance with rule 8.10) I am unable to agree that the claimant's claim ought to be struck out, as I am not entirely sure that an application for striking out is appropriate in the circumstance or can properly be made in respect of a claim in which a judgment has already been obtained.

[33] It seems to me that the defendant would have needed to firstly get a toe back into the proverbial door, i.e. these proceedings, by being successful in its application to set aside the default judgment, before a striking out application (or any other appropriate application) could properly be made. I am fortified in the view I have taken by reference to –

i) Rule 9.6 which sets out the procedure for disputing/challenging the court's jurisdiction or arguing that the court should not exercise its jurisdiction. Regrettably for the defendant, rules 9.6(2), (3) and (5) make it very clear that such a course is only available to an expeditious defendant and not a tardy

one. An application pursuant to rule 9.6 requires the defendant to first file an acknowledgement of service (see: rule 9.6(2)) and then to make the application within the period for filing a defence (see: rule 9.6(3)), should the defendant fail to make the application within the period he will be treated as having accepted that the court has jurisdiction to try the claim (see: **B&J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2, paragraphs 26-27 for how jurisdiction is to be construed);

ii) Rule 3.13 – it is useful to note that rule 8.10 is unlike rule 3.13 which clearly provides that the court may strike out any statement of case which has not been verified by a certificate of truth. There is no similar provision in respect of the failure to include a certificate of value, in fact rule 8.10 (2) clearly gives the court the discretion to transfer the matter to the Resident Magistrate's Court (now Parish Court[1]) where the amount claimed does not exceed the civil jurisdiction of the Resident Magistrate's Court; and

iii) The Court of Appeal decisions of **Dorothy Vendryes v Dr Richard Keane and Karene Keane** [2011] JMCA Civ 15 and **B&J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2 are also of some guidance. In these cases, the court considered the implications of a claimant's error/omission when setting aside a default judgment where no acknowledgement of service was filed (**Vendryes**) and where an acknowledgement of service was filed (**B&J Equipment Rental**) respectively.

In **Vendryes**, the appellant (defendant) had not denied that she was served with the claim form and the particulars of claim. Her complaint was that she was not served with the prescribed notes and requisite documents which ought to have accompanied the claim form. The Court of Appeal held, inter alia, that the default judgment was irregularly entered and was properly set

[1] The **Judicature (Resident Magistrates) (Amendment and Change of Name) Act**, 2016 came into operation on the 24th of February 2016.

aside in accordance with rule 13.2(1). Further, the claim itself was held to be invalid due to the non-compliance with rule 8.16(1).

Morrison JA discussed the decision in **Vendryes** at length in **B&J Equipment Rental** and in particular at paragraphs [36] – [37] his Lordship opined –

> *[36] ...It is in this sense, it seems to me, that as Harris JA said, the original claim form "lacked validity". It is true that the learned judge went on to link the invalidity of the claim form in explicit terms to its non-compliance with rule 8.16(1), but I cannot, naturally with the greatest of respect, regard this as anything but a mistaken reference, since there is nothing in rule 8.16(1) which speaks to the conditions of validity of a claim form.*
>
> *[37] Indeed, it is difficult to see why, as a matter of principle, it should follow from a failure to comply with rule 8.16(1), which has to do with what documents are to be served with a claim form, that a claim form served without the accompanying documents should itself be a nullity. While the purported service in such a case would obviously be irregular, as Sykes J and this court found in Vendryes,* ***I would have thought that the validity of the claim form itself would depend on other factors, such as whether it was in accordance with part 8 of the CPR, which governs how to start proceedings.*** *It is equally difficult to see why a claimant, who has failed to effect proper service of a claim form because of non-compliance with rule 8.16(1), should not be able to take the necessary steps to re-serve the same claim form accompanied by the requisite documents and by that means fully comply with the rule.*

Admittedly, the cases cited do not deal with the omission of a certificate of value (see: rule 8.10) as in the instant case but rather the omission of prescribed forms at the time of service (see: rule 8.16), however the reasoning is useful.

Disposal

[34] In light of the foregoing, it is hereby ordered that–

1. The Application for the Interlocutory Judgment in Default of acknowledgment of service of Claim Form entered on the 22nd day of October 2015 be set aside is refused;

2. The Application for the claimant's claim to be struck out is refused; and

3. Cost of this application to be awarded to the claimant to be agreed or taxed.