[2016] JMSC Civ. 75

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014HCV04524

BETWEEN	**CYNTHIA SMITH**	**CLAIMANT**
AND	**MOVAC PROTECTION LIMITED**	**DEFENDANT**

IN CHAMBERS

Ms. Shorna-Kaye Edwards instructed by Nigel Jones & Co. for Claimant/Respondent

Ms. Tavia Dunn and Ms. Gabrielle Hosin instructed by Nunes, Scholefield, Deleon & Co. for Defendant/Applicant

Heard: 18th March 2016 and 26th May 2016

Rule 13.3 of the CPR as amended [2006] - Application to set aside judgment in default - Failure to file defence in time - Delay in making application - Realistic Prospect of success

STRAW J

THE PARTIES

[1] The applicant, Movac Protection Limited, (Movac) who is the defendant in the above claim, has requested by way of a notice of application filed on 2nd October 2015 that the court set aside a judgment in default of defence entered on the 30th October 2014. Movac has also requested that the time allotted to file a defence be extended to 6thNovember 2014 and that the Defence filed on

6th November 2014 be permitted to stand. The respondent, Ms. Cynthia Smith who is the claimant, is suing the applicant for injuries received while working as a security guard employed by the said applicant.

THE RELEVANT PROVISIONS UNDER THE CIVIL PROCEDURE RULES

[2] The power of the court to set aside a default judgment regularly obtained is contained in the Civil Procedure Rules 2002, Rule 13.3, as amended [2006]. [CPR] The relevant provisions 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 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. (Rule 26.1(3) enables the court to attach conditions to any order.)*

[3] The conditions triggering the exercise of the court's discretion are clearly outlined with the major emphasis being whether the applicant has a real prospect of successfully defending the claim. If there is a defence with a real prospect of success, the court would therefore consider the other factors such as the delay in filing the defence and any reasons advanced as well as the period of time taken to file the application to set aside the judgement. Phillips JA, who delivered the judgement of the court of appeal in **Merlene Murray-Brown v Dunstan Harper**

and Winsome Harper, [2010] JMCA App 1, stated at paragraph 23 that the above emphasis is the proper focus of the court in the exercise of its discretion:

> *"*In *September 2006, the rule was amended and there are no longer cumulative provisions which would permit " a knockout blow" if one of the criteria is not met. The focus of the court now in the exercise of its discretion is to assess whether the applicant has a real prospect of successfully defending the claim, but the court must also consider the matters set out in 13.3 [2] [a] & [b] of the rules."*

[4] This emphasis was acknowledged by my sister, Edwards J [Ag] (as she then was) in **Victor Gayle v Jamaica Citrus Growers& Anthony McCarthy,** Claim No. 2008 HCV 05707. She stated at paragraph 10, that while the primary consideration is the assessment of the merits of the defence, the other factors are not redundant. In the exercise of the court's discretion therefore, the issue of any delay in the application and whether there is a good explanation for the failure to file a defence are matters that must also be assessed.

[5] It is clear also, that in dealing with the issue of delay, the court must examine the degree of prejudice to the other party if the application were to be granted. In **Peter Haddad v Donald Silvera,** SCCA No. 31/2003, Smith JA, at page 8, referred to the decision of a number of cases decided in the "Pre 2002 CPR" era. He pointed out that these cases held that in exercising its discretion the court should consider, the length of the delay, the reasons for the delay, whether there is an arguable case for appeal and the degree of prejudice to the other parties if time is extended.

CHRONOLOGY OF EVENTS

[6] It is important therefore to have regard to the chronology of events for a proper consideration of the relevant issues.

- The Claimant filed a claim against Movac on 5th September 2014 to recover damages for negligence and/or breach of statutory duty and /or breach of contractual duty.

- The Claim and all related documents were served on Movac on 10th September, 2014 and Movac filed its acknowledgement of service on 24th September 2014 within the time prescribed by the CPR.

- Default judgment for failure to file a defence was sought and obtained by the claimant on the 30th October 2014.

- A Defence was subsequently filed on the 6th of November 2014, 15 days out of the time prescribed by the CPR as it ought to have been filed on the 22nd October 2014.

- The application to set aside the default judgment was subsequently filed on 2nd October 2015.

- A Date for Assessment of Damages was set for hearing on the 23rd October 2015 at which time an order was made by Fraser J to adjourn the hearing pending the outcome of this present application.

REAL PROSPECT OF SUCCESS

[7] The first issue for the court's determination is whether Movac has a real prospect of successfully defending the claim. This claim surrounds an injury received by Ms. Smith after taking up duties as a security guard at an assigned location - Facey Commodity Limited. At that time, she took over a shift from a previous security guard who was also employed to Movac. The Particulars of Claim aver that this other security guard had negligently left the pedestrian gate at the said location open which was against the stated policy as it was to be kept closed at all times when not in use.

[8] It is averred that the claimant was assisting a vehicle to exit the compound through the main gate, when the pedestrian gate swung and collided into her fingers, causing her to sustain injuries. It is also averred, that Movac failed to employ a competent staff of men, failed to ensure that the employee was not negligent in his duty and also failed to effect a safe system of work.

[9] The Defence as filed, as well as the affidavit of Kevin Savage in support of the said application to set aside the default judgment, dispute the allegation of negligence on the part of its servant and/or agent. It is agreed that the gate at the said location is to be closed when not in use but that there is no admission or denial that the gate was negligently left open and puts the claimant to proof of the same. Movac also avers that, while it is not admitted that the gate was left open, if it was in fact left open, the claimant, in carrying out her duties, was required to ensure that the pedestrian gate was closed and to monitor the same for the providing of access and egress. It is being contended therefore that she solely caused and/or materially contributed to the incident.

[10] In considering the merits of the defence, I bear in mind, as my brother Sykes J pointed out at paragraph 22 of his judgement in **Sasha Gaye Saunders v Michael Green etal,** Claim No. 2005 HCV 2868, that the test of 'real prospect of success' is higher than the test of an arguable defence.

[11] It is certainly also not merely 'a fanciful prospect' **[Swain v Hillman and Another [2001] 1 All ER 91. In Dave Blair v Hugh C. Hyman & Co, Hugh C Hyman** Claim No. 2005 HCV 2297], a judgement of the court of appeal, Brooks JA, also considered the phrase 'real prospect of successfully defending the claim'. He quoted the editors of CIVIL PROCEDURE 2003 [The WHITE BOOK] at pages 4 and 5 of his judgment as follows:

> *"At paragraph 24.2.3 the learned editors expand on the subject:*
>
> *'…..it is sufficient for the {defendant} to show some 'prospect, i.e. some chance of success. That prospect must be real, i.e. the court will disregard prospects which are false, fanciful or imaginary. The inclusion of the word 'real' means that the {defendant} has to have a case that is better than merely arguable…The {defendant} is not required to show that his case will probably succeed at trial."*

[12] I bear in mind also, that while I ought not to conduct a mini trial at this stage, [see **ED&F Man Liquid Products Ltd v Patel & Anor** [2003] CPLR 384] there must of necessity be some evaluation of the proposed Defence in order for an assessment to be made if it has reached the required standard.

Counsel for the claimant, Ms. Edwards, referred the court to the judgment of Lord Potter at paragraph 10 in **ED&F Man**:

...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 factual assertions may be susceptible to disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable….

ANALYSIS OF THE EVIDENCE

[13] There is no great disparity in the factual assertions before this court for consideration. Although there is no documentary evidence exhibited at this stage of the proceedings, both parties apparently agree on the policy in place. However, there is disagreement as to whether the policy was breached and if so the cause and/ or contributing cause. Counsel for the defendant, Ms. Tavia Dunn, submitted that on the claim form itself there is evidence of contributory negligence as it avers that the previous guard negligently left the gate often, therefore the claimant ought to have secured it before proceeding. On the other hand, counsel for the claimant has submitted that the Defence exhibited contains little more than a denial of the crucial issues and that liability rests solely and/ or materially with the claimant but no factual assertions have been provided to contradict the claimant's statement of case.

[14] I would agree that the Defence is neither admitting nor denying that the gate was left open and merely puts the claimant to strict proof. I am also of the opinion that the averment in the claimant's statement of case is not necessarily an admission that the claimant was aware that the gate had been left open {as it may be] or it is merely a conclusion after the event that led to the injury. However, if the claimant knew the gate was left open or ought to have known, then at the least, the issue of contributory negligence would be a live issue for determination by the trial court. There is therefore some prospect of success of defending the claim which cannot be considered merely a 'fanciful, false or imaginary prospect.'

HAS THE DEFENDANT APPLIED TO THE COURT AS SOON AS REASONABLE PRACTICABLE AFTER FINDING OUT THAT THE JUDGMENT HAS BEEN ENTERED?

[15] As indicated previously, the application to set aside the default judgment was filed on the 2nd October 2015, which was 1year and 3months after the default judgment was obtained [30th June 2014]. The affidavit of Kevin Savage indicated that the attorneys for the said applicant, Nunes Schofield Deleon & Co., received a letter from Nigel Jones and Co., [attorneys for the claimant] with a copy of the judgment in default on 2nd December 2014. The affidavit of Ms. Dunn, an associate of Nunes, Schofield, Deleon & Co., supports the above assertion. The applicant would therefore have delayed filing this application for about 8 months. Without more, this delay could easily be described as inordinate and protracted.

[16] Mr. Savage states that the delay was not due to any wilful default or neglect on the company's part as the requisite instruction to make the application was given on or around 17th January 2015. He stated further that he was informed by his counsel, Ms. Tavia Dunn, that the delay was due to both the exigencies of her practice together with oversight on her part. Ms. Dunn stated the same reasons for the failure to file within a reasonably practicable time.

[17] Counsel for the claimant has submitted that the reasons offered for the delay do not constitute a good explanation and ought to be rejected. She referred the court to the judgments of Master Simmons [as she then was] in **Anwar Wright v Attorney General of Jamaica** claim No. 2009 HCV 4340 and my brother Anderson J in **Nadine Billone v Experts 2010 Company Ltd.** [2013] JMSC Civ.150

[18] **In Anwar**, at paragraphs 23 and 24, Master Simmons had to consider the explanation for the delay in filing an acknowledgement of service which was stated as inadvertence on the part of counsel in the Attorney General's office. Master Simmons referred to the case of **Ken Sales & Marketing Ltd. V James & Company [a firm]** Supreme Court Civil Appeal No. 3/05 delivered on 20th

December 2005. She noted that the delay in that case was approximately one month due to 'inadvertence and certain procedural problems in the Attorney General's office.' Master Simmons stated that the Court of Appeal held that the reason advanced was not a good explanation for failure to file on time.

[19] In **Nadine Billone**, at paragraph16, Anderson J also grappled with a similar reason for delay given by a defendant. He also referred to **Ken Sales** and noted that the neglect of counsel could not in and of itself be properly considered by this court as constituting a 'good explanation for failure to file a defence.'

[20] Counsel for the applicant referred the court to the reasoning and analysis of my sister, Edwards J in **Victor Gayle** at paragraph 3 where she stated that the discourse in judgments[interpreting rule 13.3 of the CPR 2002]which were prior to the 2006 amendment] would be inapplicable and should no longer be cited. However, the issue in the above cases as to whether explanations given for delay are satisfactory, in particular, the failure of counsel to take proper steps, is still a matter that must be assessed by the court, albeit not for primary consideration.

[21] The decision in **Ken Sales** is therefore not irrelevant as the learning to be deduced from the authorities is that counsel's neglect is not, without more, to be considered a good explanation.

[22] In **Sasha Gaye Saunders**, my brother Sykes J, at paragraph 24 stated that in the absence of some explanation for the failure to file a defence or acknowledgement of service, the prospect of succeeding in having the judgment set aside should diminish. He opined also that if the delay is quite gross then this should impact negatively on the success in setting aside the judgment.

[23] It is to be noted also that in **Nadine Billone**, Anderson J appreciated that a satisfactory explanation for the failure to file within a reasonably practicable time was not the pre eminent consideration. [See paragraphs 15 and 20]. While he concluded that the defendant had failed to satisfy the court on the two points to

be considered under 13.3 [2], he went on to grant the application to set aside the judgement on the basis that the defence had a real prospect of success.

[24] In **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ. 2 SCCA No. 101/2012, an application relating to a procedural appeal, the court, while reviewing the judgment of the trial judge, McDonald Bishop J [as she then was] considered the issue, inter alia of whether a good explanation was given for failure to file a defence. In that case, the application to set aside the default judgment was filed 3 weeks after it came to the attention of the defendant [25th January 2011]. The court noted that the judgment in default would have been entered from 17th November 2009, but the attorney for the defendant would have been aware of this from 10th August 2010.Mcdonald Bishop J had found that there had been a failure on the part of the 2nd defendant to set aside the judgment as soon as was reasonably practicable given the role of counsel in the matter who at all times participated for and on behalf of that party.

[25] The appellant submitted that the requirement was satisfied by the party who filed an affidavit on behalf of the 2nd defendant that once it was made aware of the default judgment on 25th January 2011, the appellant immediately retained new counsel who filed the application on 15th February 2011. Morrison JA, in considering that submission, stated as follows at paragraph 56:

> *' …the problem with this evidence, it seems to me, is that it provides no explanation whatsoever for the absence of an application to set aside the judgment during the period of at least five months when Mr Pearson [who was the lawyer for the defendant at the appropriate time], having become aware of the default judgment, did nothing to attempt to set it aside, but instead participated in the appellant's behalf in the interim payment hearing and a subsequent assessment of damages..'*

Morrison JA [at paragraph 57] also referred to and approved the reasoning of Sykes J in **Sasha-Gaye Saunders** in relation to what he termed as 'a not too dissimilar issue' and quoted Sykes J as follows:

> *'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.[sic] The implicit argument being that the attorney did not represent him. This 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.'*

[26] In **Peter Haddad v Donald Silvera**, SCCA No. 31/2003, the court of appeal considered an application for a discharge or variation of an order of Cooke JA [as he then was]who refused to grant an application seeking an extension of time to file reasons for appeal. Smith JA who delivered the judgment of the court, at page 14 summarized the reasons proffered for the delay as follows:

> *'[i] the parties were having discussions with a view to settling the matter and [ii] the attorney - at law who had conduct of the matter had left the firm. There was no affidavit from the attorney, who had left, as to the reason for non compliance on his part'.*

Smith JA then referred to Cooke JA's decision that the reasons given were not such as to persuade him to grant the application and concluded that the applicant had not shown that Cooke JA wrongly exercised his discretion.

ANALYSIS IN RELATION TO REASONS FOR THE DELAY

[27] Has any proper reason be proffered by the defendant for the delay in applying to set aside the judgment in default? There has clearly been none, although there is an affidavit from counsel proffering a reason. It is to be noted that counsel for the applicant had two separate opportunities to make a more timely application. Firstly, after the notice sent in December 2014 and secondly, on receiving the clients' instructions in January 2015. The failure to do so would appear to be grossly negligent and this is even more so, as Ms Edwards has submitted as, the memory of counsel had been jolted as recently as 17th August 2015 with the service of the date for assessment for damages. Even then, no action was taken until approximately 2 months later.

[28] However, while I have found that the delay in relation to the application to set aside is inordinate and without a good explanation, I bear in mind the words of Morrison JA in **B&J Equipment** at paragraph 58. He referred to and quoted the

judgment of Phillips JA in **Murray-Brown v Harper** [at paragraph 30] whom, he stated, issued the following caveat against uncritically visiting a party with the consequences of the default of the attorney at law:

> *'The fact is that there are many cases In which the litigants are left exposed and their rights infringed due to attorneys[sic] errors made inadvertently, which the court must review. In the interests of justice, and based on the overriding objective, the peculiar facts of a particular case, and depending on the question of possible prejudice or not as the case may be to any party, the court must step in to protect the litigant when those whom he has paid to do so have failed him, although it was not intended'*

[29] Morrison JA then went on to caution at paragraph 59 that it was therefore necessary in every case, to examine the facts with care before arriving at the conclusion that 'counsel's knowledge is [the client's] knowledge'. Ms. Dunn referred the court to the case of **The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr. [a minor] by Rashaka Brooks Snr. [His father and next friend** [2013] JMCA Civ. 16, an authority from the court of appeal. In the case Brooks JA considered an explanation for delay in filing a Defence and disagreed with the findings of the Master that it was inadequate and lacking in credibility. He stated as follows (paragraph 32):

> *'Ms. Chisolm attributed the initial delay to administrative oversight in her chambers. Such oversight has, more than once, been excused in these courts on the basis that a deserving litigant ought not to be shut out because of an error by his attorney at law. It is usually when the behavior is grossly negligent that the litigant's position is imperilled. We do not regard this as grossly negligent behavior. In addition, Ms. Chisolm's efforts to secure the required instructions are credible and she has given a time for completion of that exercise.'*

[30] It is to be noted however, that In **Rashaka Brooks,** at the time of the hearing of the application before the Master, no draft defence had been filed and it was 7 weeks overdue. Also, counsel for the applicant had requested a further 3 weeks to file the Defence.

[31] It is clear therefore that each case will turn on its own peculiar facts although there are general principles established and the authorities abound which speak to the importance of requiring that time limits are there to be observed. [See **Peter Haddad** per Smith JA page 11].

[32] In the case before me for consideration, while I accept that Movac had done what they were required to do through Mr Savage, the action or lack of it by counsel cannot be described as mere inadvertence. I therefore retain my initial assessment that there was gross negligence on the part of counsel and that no good reason has been offered for the failure to file the application within a reasonably practicable time.

REASONS FOR FAILING TO FILE DEFENCE ON TIME

[33] The affidavit of Kevin Savage speaks to the failure to file defence as being due to an administrative error in that the date for filing the defence was entered as 6th November 2014. The Defence was subsequently filed on that date. Ms. Dunn's affidavit also speaks to this. It is my opinion that this reason for the late filing can be described as an error by counsel and ought not to be one visited on the defendant. I bear in mind also that the delay, as stated previously was one of 15 days. This certainly cannot be considered inordinate as counsel for the claimant has admitted. In all the circumstances, I am of the opinion that an acceptable reason has been offered for this short delay.

ISSUE OF PREJUDICE

[34] Before coming to a decision whether to grant of refuse the application, I must consider also the issue of prejudice. Counsel for the applicant has submitted that the claimant has made no specific allegations speaking to any prejudice save for the loss of ability to proceed speedily to the assessment of damages. In her submissions, Ms. Edwards also emphasized that a claimant who has secured a regular default judgment has something of value and should not be deprived of it without exceptional reasons.

CONCLUSION

[35] In coming to a determination on this matter, I bear in mind that there are no specific reasons alleging that the claimant would suffer any prejudice and, given the fact the defendant has already filed the proposed defence, the claimant would also have been put on notice of that defence. There is therefore an absence of evidence as it relates to any real or substantial prejudice to the claimant.

[36] I also bear in mind that the court is to have regard to the overriding objective in the CPR which speaks to dealing with cases justly [Rule 1.1 [1] and as such the court is to seek to give effect to the overriding objective when interpreting the rules or exercising any powers under the rules [Rule 1.2]. (See **Rashaka Brooks**) per Brooks JA paragraphs 13 -14 and at paragraph 15 where he quotes from the judgment of Lightman J on this point in **Commissioner of Customs and Excise v Eastwood Care Homes [Ilkeston] Ltd and Ors.** [All England Official Transcripts [1997-2008] [delivered 18 January 2000].

[37] In **Commonwealth Caribbean Civil Procedure, 2nd edition,** Gilbert Kodilinye & Vanessa Kodilinye, the learned authors at page 246 speak to 'dealing with cases justly' as being exemplified by the principle that a litigant should not be prevented from pursuing his claim merely by a breach of procedural rule. 'Doing justice' is also stated to embody the concept that the courts ought to decide claims **as far as possible** on their merits, and not reject them on grounds of procedural default. [emphasis added] This understanding is in line with the dictum of Lord Atkin in the ancient case of **Evans v Bartlam** [1937] 1 AC,473.The learned judge stated as follows at page 480:

> *"The principle obviously is that unless and until the court has pronounced a judgement upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure'*

[38] The 2006 amendment to the CPR in relation to Rule 13.3 with the change in emphasis (as to whether the defence has a realistic prospect of success) is conducive to the court exercising its discretion in accord with this principle as stated in **Evans.**

Having considered all the above factors and bearing in mind that the most important consideration is that the proposed defence has a real prospect of success, I will be granting the orders requested by the applicant.

DISPOSAL

[39] It is therefore ordered as follows:

The Judgement in Default of Defence entered on 30th October 2014 is set side.

Time granted for the defendant to file Defence is extended to 6th November 2014.

The Defence filed on 6th November 2014 is permitted to stand,

Costs of the application and costs thrown away to the claimant to be agreed or taxed.