



[2022] JMSC Civ 110

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2019CV02372

BETWEEN	MERLINE LESLIE	CLAIMANT
AND	TOP SEAL COMPANY LIMITED	DEFENDANT

IN CHAMBERS

Mr Ravil Golding instructed by Lyncook Golding and Co Attorneys-at-law for the Claimant/Respondent

Mr Obika Gordon instructed by Frater Ennis and Gordon Attorneys-at-law for the Defendant/Applicant

Heard: July 5, 2022 and July 12, 2022

Application to set aside default Judgment – service on limited liability companies – CPR 5.7, CPR 13.2 and CPR 13.3

T MOTT TULLOCH-REID, J

Background

[1] On June 7, 2019 the Claimant brought a claim against the Defendant in negligence seeking damages for injuries she allegedly sustained while a lawful guest at the Defendant’s hotel. On July 8, 2019, Lola Cohall swore an Affidavit which was filed on July 9, 2019. The content of the Affidavit is to the effect that the claim form and

particulars of claim were served on the Defendant by sending them through registered post. The registered mail was sent to 1-2 Sunset Boulevard, White Sands Beach P O, Montego Bay in the parish of St James. No answer being filed, the Claimant requested a default judgment which was entered on October 7, 2019 by the Deputy Registrar. The Judgment was however filed on July 13, 2020. The Notice of Assessment of Damages was issued on August 10, 2020 for the hearing of the Assessment of Damages on October 4, 2021.

- [2] On November 22, 2021 the Defendant applied to set aside the Default Judgment on the basis that the initiating documents were not served on it or in the alternative that it has a real prospect of successfully defending the claim. The basis on which the application is made is set out in the Affidavit and Supplemental Affidavit of Eugennie Minto, the Defendant's Managing Director. The Affidavit was filed on November 22, 2021 and the Supplemental Affidavit was filed on March 22, 2022.

Evidence Eugennie Minto

- [3] Ms Minto's evidence is contained in her affidavits referred to in paragraph 2 above. I will point out what I believe are the relevant aspects of the evidence. Ms Minto's evidence is that the Defendant's registered address is 1-2 Sunset Boulevard, Montego Bay, Montego Bay P O 1 in the parish of Saint James. She exhibits to her supplemental affidavit the print out from the Registrar of Companies which confirms that the Defendant's registered address is 1-2 Sunset Boulevard, Montego Bay, Montego Bay P O 1 in the parish of Saint James. She says she was never served with the claim form and particulars of claim. To prove that, she exhibits a letter from Mrs Diane Thompson Clarke, the Senior Legal Officer (Ag) at the Post Office who signed for the Post Master General. Mrs Thompson Clarke states in her letter, that the postal article which was sent by the Claimant's attorneys, was received into the White Sands Beach Post Office but was never collected. Because it was never collected, the letter was returned to the General Post Office and when it was not collected from that location by the Claimant's

attorneys-at-law, who she says were issued with a notice, it was sent to the Dead Letter Unit.

- [4] Ms Minto says she only became aware of the claim when she received a letter from the Claimant's attorneys which had enclosed with it, the Default Judgment and Notice of Assessment of Damages. This, she received, on or around October 6, 2021. I will note here that she would have received the letter after the Assessment of Damages would have already passed since it was scheduled to take place on October 4, 2021.

Cross examination of Eugennie Minto

- [5] In cross-examination, Ms Minto was quite cross. She was very aggressive in her responses and was rather impatient and curt with Mr Golding. Her evidence was contradictory. In one breath, she denied ever picking letters up for the Defendant from the White Sands Beach Post Office but in another, she confirmed that she would sometimes pass by the White Sands Beach Post Office and make enquiries as to whether there were any letters there for the Defendant. In answer to my question where the hotel is located, she responded, "*on White Sands Beach*". In response to my question as to whether the White Sands P O was near to the hotel, she answered in the affirmative.
- [6] Ms Minto said she received the letter enclosing the Default Judgment and Assessment of Damages when the post man delivered it to her at the hotel. She said she resides at the hotel. When Mr Golding suggested to her that she did not get a letter delivered to her at the hotel but rather a registered slip, she agreed with him. She then agreed with him that having received the registered slip she would be required to go to the post office that issued it to collect the mail and sign for it. When asked if she in fact followed that procedure, she answered in the affirmative. She also agreed with Mr Golding that the hotel operates from the location 1-2 Sunset Boulevard, White Sand Beach, Montego Bay and that the company collects mail at White Sand Beach P O but later when Mr Golding asked

“The Claim Form and Particulars of Claim which were sent to Top Seal Limited on July 3, 2019 were sent to the very same Post Office, White Sand Beach P O, and it is the very same Post Office you said you collected the mail from in October?”

her response was

“I do not understand the question.”

- [7] On further questioning from Mr Golding, Ms Minto said she got one set of documents from the White Sand Beach Post Office only and that she did not know about a second one. When asked to which post office letters are sent to the Defendant, she responded by saying

“They go to Montego Bay P O 1 and they send it over to White Sands Beach P O”.

- [8] Generally, I found Ms Minto evasive and reluctant to assist the process. When questions were asked of her by Mr Golding, her answers were contradictory and she was not forthright in her responses. She was a difficult and uncooperative witness who would only respond without hesitancy or hostility when the questions came directly from the Bench. It was clear to me that she was trying not to have any sort of connection with White Sands Beach Post Office, although on her evidence, it is clear that she did some amount of business with them to the extent that she even said

“If I am passing by I will stop to see if they have anything for me.”

- [9] I do not find Ms Minto to be a straight forward witness. When asked where the hotel was located, she insisted that it was located at 1-2 Sunset Boulevard. She refused to say whether 1-2 Sunset Boulevard was on White Sands Beach and only confirmed its location when I asked her if that was where it was located. At first she said she did not collect letters for the Defendant from White Sands Beach P

O, but then later in her evidence, she said she did. I do not believe her when she says that she did not collect letters from the White Sands Beach P O which were sent to the Defendant. Based on her evidence, I am able to conclude that if the White Sands Beach P O notified her that documents were at the post office for the Defendant she would pick them up from that Post Office.

Analysis

[10] The general rule is that a claim form **must** be served personally on a defendant. In the case of the limited liability company CPR 5.7 reads as follows:

“Service on a limited company may be effected -

(a) by sending the claim form by telex, FAX, prepaid registered post, courier delivery or cable addressed to the registered office of the company;

(b) by leaving the claim form at the registered office of the company;

(c) by serving the claim form personally on any director, officer, receiver, receiver-manager or liquidator of the company

(d) by serving the claim form personally on an officer or manager of the company at any place of business of the company which has a real connection with the claim; or

(e) in any other manner allowed by the enactment.

[11] The rules as it relates to serving the limited company seem to, with the use of the word “may”, suggest the other methods outside of what is listed in CPR 5.7 can be used to bring the claim form to the company’s attention. The methods listed in CPR 5.7 are just some of the ways suggested. The use of the words “*or in any other manner allowed by the enactment*” could suggest to the reader that those words close off the options available to serve the defendant, which is a limited

liability company. Had the drafters used words to the effect “*or any other manner that will bring the documents to the attention of the defendant*” it would make it abundantly clear to the reader that any method that can be used to bring the initiating documents to the Defendant’s attention could be an effective means of service.

[12] To clear up any doubt, I considered what service of documents was meant to achieve and asked myself the question what is the purpose of service? Service is to meant to bring the documents to the attention of the Defendant. As it relates to persons, and the service of the initiating documents, service must be done personally. So if in serving a limited liability company, the process server uses the option of serving a director of the limited liability company, that service must be personal. However, there is no requirement for personal service on the company itself – meaning the documents do not have to be left directly at the registered office of the company. It **may** be left there but there are other options open to the claimant to bring the documents to the attention of the defendant, which is a limited liability company.

[13] Section 387 of the **Companies Act** provides that

*“A document **may** be served on a company by leaving it at or sending it by post to the registered office of the company.” (my emphasis)*

The Act itself does not mandate service by a particular method. Rather, it suggests methods by which a limited liability company can be served. “May” is always discretionary. “Shall”, depending on the context, can mean “must” or “may”, and “must” is always intended to be “mandatory”.

[14] Since the drafters of the **Companies Act** and the CPR use the word “*may*” when service is to be effected on a limited liability company, it seems to me then that a claimant is well within her right to effect service on a defendant company by posting the initiating documents to the usual place of business of that company. Where the method of service prescribed by the statute or the CPR does not mandate a

method of service, although it is the practice to follow the methods suggested by the statute or the CPR, there is nothing to prevent the use of any other method that would bring the documents to the attention of the Defendant.

[15] Ms Minto has assured me in her evidence that the Defendant is located at White Sands Beach and received mail through the White Sands Beach Post Office from time to time. I am of the view that when the Claimant's attorneys-at-law sent the documents to the White Sands Beach Post Office which governs where the Defendant has its usual place of business, it was an appropriate place to post the initiating documents to by registered post. I am also of the view that when the documents were posted to 1-2 Sunset Boulevard, White Sands Beach P O, Montego Bay, St James, which is the usual place of business of the Defendant company, it is reasonable to believe that the documents would have been brought to the Defendant's attention.

[16] I believe I am correct in this position because Ms Minto in her evidence was clear that she had collected at least one other Court document for the Defendant from the White Sands Beach P O and that was the letter enclosing the Default Judgment and Notice of Assessment of Damages (see paragraph 6 of Affidavit filed November 22, 2021). She received the notification from the Postman who came to the hotel on bicycle and then she went to the Post Office, collected the document and signed for it. It seems strange to me that the Post Office would have notified her of one set of documents but not of the other even though they were both sent to the same address.

Whether the Default Judgment is to be set aside pursuant to CPR 13.2

[17] I believe the method of service used to bring the initiating documents to the Defendant's attention was an appropriate one. The question that must be answered was whether there was service as this will determine whether the default judgment must be set aside as of right. Ms Minto's evidence is that the first time she became aware of the claim was on October 6, 2021 when she received a letter

dated September 8, 2021 from the Claimant's attorneys-at-law. The letter enclosed the Default Judgment and the Notice of Assessment of Damages. That set of documents was posted to the Defendant at 1-2 Sunset Boulevard, White Sands Beach P O, St James. For some inexplicable reason, they were not received by the Defendant. Mrs Thompson Clarke from the Post Office indicated in her letter that the mail was received into the post office but was not collected by the Defendant.

[18] I have before me, the uncontested evidence as contained in a letter from Mrs Thompson Clarke. In the letter, the Mrs Thompson Clarke said that on August 28, 2019 the letter which was sent to the Defendant was returned by White Sands Beach Post Office to the General Post Office in Kingston because it was uncollected and that Lyncook, Golding & Co was notified that the package had been returned. Unfortunately, Mrs Thompson Clarke did not say

- a. whether the Defendant was notified of the receipt of the mail into the post office
- b. if the answer to (a) above was yes, when the Claimant was notified and how the notification was sent; and
- c. when Lyncook, Golding and Co was notified that the mail was returned to the General Post Office and how the notification was sent.

I am not able to speculate on any of those dates. That would have to be brought out in the evidence. However, Mr Golding, having been served with the Supplemental Affidavit of Ms Eugennie Minto which exhibits the letter from the Post Office from as far back as March 22, 2022, did not at any time, ask for her to be present to be examined at the hearing.

[19] The letter goes on to say that because the postal documents were not claimed when they returned to the GPO, they were sent to the Dead Letter Branch at South Camp Road in Kingston on October 10, 2019. Mr Gordon invites me to conclude that if they were sent to Dead Letter Branch on October 10, 2019, the Claimant's

lawyers must have been notified of the fact of non-collection prior to October 10, 2019. That is very likely. We do not however know how that notification was sent. Similarly, we do not know when the White Sands Beach P O notified the Defendant that it had mail for it.

[20] Notwithstanding the above, I believe it is safe to conclude on a balance of probabilities that the Defendant was notified. I feel secure in coming that conclusion because Mrs Thompson Clarke would not have said the package was not claimed if the Defendant was not notified that it was at the post office.

[21] The Default Judgment was requested on October 7, 2019. I believe that on a balance of probabilities, it is not likely that the post office would have notified the Claimant's attorneys-at-law that the document was not collected and then immediately or just a few days later send the documents off to Dead Letter Unit because it remained uncollected. I am of the view that a reasonable time must have passed before the post office would have sent the documents off to the Dead Letter Unit. Although I can form that conclusion, I cannot speculate as to when the notification could have been done. Was it done on October 8, October 6, October 5? or on a date in September? I do not know. All I know is that the Default Judgment was entered on October 7, 2019.

[22] So what I have here is an issue where the package containing the initiating documents were unclaimed by the Defendant and then when it was returned to the sender, the sender did not claim the returned package either. The Claimant made the request for the Default Judgment on October 7, 2019.

[23] The issue is, whether there was service of the Claim Form and Particulars of Claim on the Defendant in an instance where the Defendant did not collect them from the post office? The question is answered in the case of ***Ace Betting Company Limited v Horseracing Promotions Limited Court of Appeal SCCA 70 & 71/90*** where it was held on page 13, the learned Court quoting from ***A/S Cathrineholm***

v Norequioment Trading Limited (1972) 2 WLR 1242 at 1247 Lord Denning
who said

*“When the plaintiff sends a copy of the writ by prepaid post to the registered office of the company, **and it is not returned and he has no intimation that it has not been delivered it is deemed to have been served on the company** and to have been served on the day on which it would ordinarily be delivered. If no appearance is entered in due time, the plaintiff is acting quire regularly in signing judgment.”*
(my emphasis)

[24] Since I do not know when the Claimant’s attorneys-at-law would have been notified by the Post Office that the documents had returned unclaimed and since a default judgment was entered against the Defendant, I can only conclude that when the Claimant made the request for the default judgment, she had no intimation that the initiating documents had not been delivered and therefore they were deemed served. The documents were sent by registered post on July 3, 2019 and would have been deemed served 21 clear days thereafter. The Default Judgment was entered in October 2019 well after the time that the documents would have been deemed served. It means therefore that the default judgment ought not to be set aside on the basis that the Defendant was not served.

Can the Default Judgment be set aside pursuant to CPR 13.3?

[25] I am of the view that it can be set aside pursuant to CPR 13.3. Ms Minto says she received the Default Judgment on October 6, 2021. The application to set aside was made on November 22, 2021, a little over a month later and the Defendant has demonstrated that she has a defence that has a real prospect of succeeding. Her Affidavit of Merit and draft defence suggest to me that the Defendant has a real prospect of successfully defending the claim.

[26] I therefore order as follows:

- a. The Default Judgment entered in Judgment Binder number 775 Folio 121 on October 7, 2019 is set aside.
- b. The Defendant is to file and serve its defence to the claim on or before July 29, 2022.
- c. The parties are to attend mediation on or before October 31, 2022.
- d. If mediation is unsuccessful the parties are to attend Case Management Conference on December 8, 2022 at 2pm for half hour by videoconference.
- e. The Defendant is to pay the Claimant costs in the application, which are to be taxed if not agreed.
- f. The Defendant's attorneys-at-law are to file and serve the Formal Order.