[2019] JMCA Civ 11

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CIVIL APPEAL NO 12/2018

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

BETWEEN	**PETER HOLMES**	**APPELLANT**
AND	**BRYAN GRAY**	**RESPONDENT**

Lemar Neale instructed by Nea/Lex for the appellant

Miss Kawayne Henry instructed by Mrs Michelle Nembhard Pickersgill for the respondent

13 March and 10 May 2019

BROOKS JA

[1] I have read in draft the judgment of my sister Foster-Pusey JA. I agree with her reasoning and conclusion and have nothing further to add.

P WILLIAMS JA

[2] I too have read the draft judgment of my sister Foster-Pusey JA and agree with her reasoning and conclusion. There is nothing I wish to add.

FOSTER-PUSEY JA

[3] This matter was heard on 13 March 2019. At the close of submissions, we advised the parties that we would render a decision on 12 April 2019. We sincerely apologise for not delivering the decision at the promised date.

Background

[4] This is an appeal originating from the Corporate Area Parish Court, Civil Division, where the learned Parish Court Judge, Her Honour Miss Stephany Orr, refused the appellant's application to set aside default judgments entered against him on 26 April 2017.

[5] The issues between the parties have their genesis in a lease agreement entered between them for a period of one year (1 January 2012 to 21 December 2012) and thereafter converted to a monthly rental. The rental was for office space and a bakery situated at 52 Studio One Boulevard, Kingston 5.

[6] The agreed rental for the use of the premises was $135,000.00 per month. The appellant covenanted to pay the rent reserved, which also included the responsibility for any and all utility costs relative to the use of the office space and the bakery.

[7] The appellant did not honour his covenant to pay the rent and as a result the respondent gave the appellant a notice to quit.

[8] On 19 March 2015, five plaints (ie Nos 1500-4/2015) were lodged in the Corporate Area Parish Court, instituting proceedings against the appellant; claiming breach of rental agreement for outstanding rent during the period of April 2012 to December 2014. The following are the various plaints and the sums claimed by the respondent:

i. Plaint 1500/2015 - $960,000.00 - Seven months' rent - 1 May 2012 to 30 November 2012 at $135,000.00 per month and a balance of $15,000.00 from the month of April 2012;

ii. Plaint 1501/2015 - $945,000.00 - Seven months' rent - 1 December 2012 to 30 June 2013 at $135,000.00 per month;

iii. Plaint 1502/2015 - $945,000.00 - Seven months' rent - 1 July 2013 to 31 January 2014 at $135,000.00 per month;

iv. Plaint 1503/2015 - $945,000.00 - Seven months' rent - 1 February 2014 to 31 August 2014 at $135,000.00 per month; and

v. Plaint 1504/2015 - $945,000.00 - Seven months' rent - 1 September 2014 to 31 March 2015 at $135,000.00 per month.

Altogether the sum of $4,740,000.00 was being claimed for outstanding rental.

[9] On the day of the return of the summons, the plaints were adjourned to 6 October 2015 and were subsequently struck out due to the absence of both parties to the claims.

[10] On 11 July 2016 the respondent successfully applied to have the plaints re-listed and the matters were set for mention on 23 September 2016. On this date, the appellant was not present. However, his representative (his employee), Ms Danielle Moncrieffe, was present at court along with his attorney-at-law. The notation on the court file indicated that the claims were adjourned to 24 November 2016 for the "defendant to be present and for instructions".

[11] On 24 November 2016, when the matter was called up for hearing, the appellant was again absent. His representative was present. The learned Parish Court Judge ordered costs for the day in the sum of $3,000.00 against the appellant and the matter was adjourned for default judgments to be entered on 20 December 2016. There was a notation on the file that read "for defendant to be present on the next date".

[12] On 20 December 2016, the appellant still did not attend court but had a representative attending. At this time the learned Parish Court Judge entered default judgments against the appellant in respect of each plaint.

[13] On 24 March 2017, three months later, the appellant filed applications, with supporting affidavit evidence, to set aside the default judgments. In the affidavit evidence, the appellant outlined that his assistant was the one who attended court on the day that judgment was handed down in favour of the respondent. He stated that the said assistant attended all prior mention dates on his behalf and had not informed him that he needed to be present at court on the date that judgments were entered against him.

[14] The appellant explained that on 20 December 2016 he was unavoidably absent from court because he had commitments to fulfil for his clients in Montego Bay. He stated further that he was challenging the amount claimed by the respondent, the sum claimed was inaccurate and he owed significantly less.

[15] On 26 April 2017, the applications to set aside default judgments were heard by the learned Parish Court Judge. Present at court were the respondent and the

appellant's representative. The appellant was again absent. The learned Parish Court Judge refused the applications. Thereafter the appellant filed notices of appeal dated 9 May 2017.

Findings of fact and law challenged by the appellant

[16] The appellant has highlighted a number of findings of fact and law made by the learned Parish Court Judge and which he challenges:

> "a. The applications to set aside the default judgments were filed some three months after judgment was entered in favour of the [respondent]. Judgment summonses had already been filed by the [respondent] in each claim to enforce his judgments. [The appellant] has not provided an explanation for the delay in applying to set aside the judgments bearing in mind that his representative would have been present in Court when the default judgments were taken against him and he would have thus been aware of the judgments being entered in his absence in December 2016;
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> b. There was nothing in his affidavit or otherwise to indicate that he was unaware of the Court's requirement for him to attend Court and provide his Counsel with instructions on these two prior occasions. The fact that Ms Moncrieffe attended court on his behalf is evidence that he would have received the Clerk's correspondence requesting him to attend;
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> c. His unexplained absences particularly after the Clerk of Court's letter requesting him to attend would be a consideration for me when looking at his conduct, and would also be an issue he would have been asked to address in oral evidence. He being absent, I could not simply accept his affidavit evidence without more. He has therefore in my view not provided a satisfactory reason for his absence from court on the date that the default judgments were entered in favour of the [respondent];
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> d. [The appellant] has been sued for rental for the period May 2012 to December 2014. He has simply said in his defence; I do not owe all of that money. I owe significantly less. He has not bothered to indicate to the Court how much he owes or how much is outstanding

and why he states that all of the monies are not outstanding whether he has already paid the [respondent] the sums claimed or whether he is counterclaiming for expenses justly incurred on behalf of the [respondent] or otherwise. His defence is simply a bare denial of the [respondent's] claim;

e. In his affidavit [the appellant] states that he is a Chartered Accountant by profession. How difficult would it have been for him to calculate the rental he admits to owing, state his figure and the reason why the balance is not owed? Indeed had he provided this information from the very first request by the Court for him to instruct his Counsel, this may have eliminated the need for a full trial and the matter could have been at any time prior to the default judgment being entered, referred to mediation or set for an assessment of damages to determine the amount owed by the [appellant];

f. Without an explanation of his defence as to why he says he does not owe the [respondent] the total amount claimed, how would the Court determine whether he had a defence on the merits?

g. [The appellant's] defence as outlined in his affidavit leaves nothing for me to consider. The [respondent] has clearly outlined the monthly rental, the date same is due and the amount outstanding. In response [the appellant] has simply stated that he does not owe the sum claimed. I could not find that he has established a prima facie defence on the merits or an arguable defence on this information [sic]; and

h. Lastly, the Court must consider the issue of prejudice to the [respondent]. This was not addressed by the defence. His claim for rental in arrears extends back to 2012, some five years previous. [The appellant] has admitted that he owes a portion of these monies in saying that the sum he owes is significantly less than the sum being claimed. He has not however stated the sum that he admits is owing such that, the Court in seeking to set aside the default judgment could enter Judgment on Admission on the admitted amount which the [respondent] could begin to collect in the interim while he awaits a trial for the sum disputed. This is particularly prejudicial, where one of the claims speaks to arrears from 2012."

I will return to a consideration of these findings of the learned Parish Court Judge later in this judgment.

Amended grounds of appeal

[17] On 10 December 2018, having been granted the permission from this court to amend the grounds of appeal, the appellant filed amended grounds of appeal challenging the refusal of the learned Parish Court Judge to set aside the default judgments entered on 20 December 2016.

[18] The appellant has filed four amended grounds of appeal against the decision of the learned Parish Court Judge. They are:

> "a. That the learned Parish Judge erred as a matter of fact and/or law and/or wrongly exercised her discretion when she refused to set aside the default judgments entered in the appellant's absence in circumstances where the appellant had a representative present at court when the default judgments were being entered;
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> b. The learned Parish Judge erred as a matter of fact and/or law and/or wrongly exercised her discretion when she found that the appellant had not provided an explanation for the delay in applying to set aside the default judgments;
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> c. The learned Parish Judge erred as a matter of law in finding that the appellant has not established a prima facie defence on the merit and that the appellant's defence is a bare denial; and
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> d. The learned Parish Judge erred as a matter of law in finding that the respondent was prejudiced in circumstances where there was no evidence of prejudice from the respondent before her."

[19] I have considered the amended grounds of appeal and have concluded that the only ground of appeal that is meritorious is ground a. As a result, with no disrespect

intended to counsel, and no disregard of the other amended grounds of appeal, the examination of the other grounds of appeal will be brief. I now examine the grounds of appeal.

Appellant's submissions

Ground A - That the learned Parish Judge erred as a matter of fact and/or law and/or wrongly exercised her discretion when she refused to set aside the default judgments entered in the appellant's absence in circumstances where the appellant had a representative present at court when the default judgments were being entered

[20] Counsel for the appellant contends that the learned Parish Court Judge should have proceeded to deal with the plaints as if the appellant were present in person, as the appearance of the representative of the appellant was deemed to be his appearance. In supporting this point counsel cited sections 186 and 188 of the Judicature (Parish Court) Act ("the Act").

[21] Section 186 provides:

> "If on the day so named in the summons, or at any continuation or adjournment of the Court or cause in which the summons was issued, the defendant shall not appear or sufficiently excuse his absence, or shall neglect to answer when called in Court, the Magistrate, upon due proof of the service of the summons, may proceed to the hearing or trial of the cause on the part of the plaintiff only; and the judgment thereupon shall be as valid as if both parties had attended:
>
> Provided always, that the Magistrate in any such cause, at the same or any subsequent Court, may set aside any judgment so given in the absence of the defendant and the execution thereupon, and may grant a new trial of the cause, upon such terms as to costs or otherwise as he may think fit, on sufficient cause shown to him for that purpose."

[22] Particular emphasis was placed on section 188, which provides:

> "It shall not be lawful for any person, except the party to a suit or other proceeding, or a member of his family, or his clerk or servant, or his master, or any officer or clerk of a company or corporation duly authorized under the seal of such company or corporation, or an admitted solicitor, being the solicitor generally in the action for such party, or a barrister or advocate retained by or on behalf of such party, to appear and act for such party in such suit or proceeding; **but an appearance by any such person shall be deemed to be an appearance of the party for whom he acts**…" (Emphasis added)

[23] It was further argued that the learned Parish Court Judge fell into error when she refused to set aside the default judgments and acted outside of the powers conferred by the relevant statute since there was no basis in law for the learned Parish Court Judge to have entered default judgments. Reliance was placed on the case of **Tracy Taylor v Rudolph Melliphant** (unreported), Court of Appeal, Jamaica, Resident Magistrates Civil Appeal No 14/2008, judgment delivered on 12 December 2008, where Harrison JA, in delivering the judgment on behalf of the court, stated at paragraph 12 that:

> "Since the Resident Magistrate is a creature of statute he therefore enjoys no greater power in the exercise of his duties other than what is expressly or impliedly granted by statute. The courts over which he presides are inferior courts without any inherent jurisdiction and with only such jurisdiction as conferred upon them by Statute. See Lindo v Hay Clarke's Reports 118."

Further at paragraph 13:

> "Resident Magistrates must therefore act in accordance with the procedures laid down in the statute and not otherwise…"

[24] Counsel, relying on the case of **Tracy Taylor**, submitted that the learned Parish Court Judge should have proceeded to try the matter in a summary way. In that matter Harrison JA also opined at paragraph 13:

> "Sections 181 to 210, of the Act, set out the provisions in connection with 'Trial of Causes'. Section 184 in particular, governs the procedure in relation to the determination of civil matters and provides as follows:
>
> > '184. On the day in that behalf named in the summons, the plaintiff shall appear, and thereupon the defendant shall be required to answer by stating shortly his defence to such plaint; and on answer being so made in Court, the Magistrate shall proceed **in a summary way to try the cause**, and shall give judgment without further pleading, or formal joinder of issue'." (Emphasis added)

The learned judge of appeal continued to say at paragraph 14 that:

> "In **Nehemiah Sterling v Portland Parish Council** (1968) 11 JLR 13, Fox JA said at page 14:
>
> > 'The section seems to contemplate that the plaintiff will be given an opportunity to prove his claim and be allowed to fail by way of his effort, and not otherwise, and that this may be so **even though the magistrate and the defendant consider the stated defence unanswerable**.'" (Emphasis added)

[25] It was submitted that the court should have called upon the appellant's representative as if she were the defendant to briefly state his defence to the plaints. The court should have proceeded to try the matter in a summary way, which requires the plaintiff to prove his case. Counsel argued that the fact that the relevant sections of the Act were not followed meant that there is only one inescapable conclusion and

that is that the court erred in granting the default judgments and the learned Parish Court Judge erred in refusing to set aside the default judgments.

Respondent's submissions

[26] Counsel for the respondent argued that although the appellant has said that he had a representative present and that section 188 of the Act should have been followed by the learned Parish Court Judge, there is no proof on which to base this premise.

[27] Counsel argued that the alleged agent had failed to prove to the court the basis of her authorization, despite the learned Parish Court Judge's request for her to bring such authorization in the form of a letter. She failed to provide an employment letter, letter of authorization and/or copy of a power of attorney. Counsel argued that it was on this basis that the learned Parish Court Judge requested the presence of the appellant.

[28] These requests were not complied with and as such the learned Parish Court Judge was left with no other choice but to treat the matter as having coming on for hearing without the appellant having answered. Thus allowing for the entering of the default judgments.

Discussion

[29] I have considered the submissions of counsel and wish to add that in addition to sections 186 and 188 of the Act, referred to by counsel for the appellant, section 184 of the Act (as outlined above) is also important.

[30] I repeat solely for ease of reference. Section 184 provides:

> "On the day in that behalf named in the summons, the plaintiff shall appear, and thereupon the defendant shall be required to answer by stating shortly his defence to such plaint; and on answer being so made in Court, **the Magistrate shall proceed in a summary way to try the cause,** and shall give judgment without further pleading, or formal joinder of issue." (Emphasis added)

[31] Whilst addressing the point that the learned Parish Court Judge ought to have treated the representative as if she were the defendant, counsel for the appellant made reference to the **Tracy Taylor** case. I note that counsel for the appellant did not refer to paragraph 15 of the judgment and I find that it is also relevant. Harrison JA stated:

> "It is abundantly clear that the words, 'in a summary way to try the cause', referred to in section 184 of the Act, must be construed to mean that the Magistrate must carry out an examination upon oath of witnesses as envisaged by section 183 of the Act and will thereafter give judgment without further pleading or formal joinder of issue."

[32] The case of **Leeman Vincent v Fitzroy Bailey** [2015] JMCA Civ 24 is instructive. In that case McDonald-Bishop JA (Ag), as she then was, outlined the requirements the court should consider on an application to set aside a default judgment. The requirements are as follows:

i. The reason for the failure of the defendant to appear when the case was listed to be heard;

ii. The question of prejudice to the plaintiff if the judgment were to be set aside and a new trial ordered; and

iii. The prospect of success of a defendant who was applying for a new trial.

[33] Counsel for the appellant has correctly argued that the learned Parish Court Judge is a creature of statute and therefore cannot act outside of the ambit of the Act. In **Leeman Vincent v Fitzroy Bailey** McDonald-Bishop JA (Ag), in commenting on section 186 of the Act, stated at paragraph [17]:

> "It is clear from a reading of the section that the fundamental pre-requisite for the grant of a judgment by default in the Resident Magistrate's Court is the absence of the defendant. So, where the defendant is present in person judgment by default cannot properly be entered against him."

[34] In continuing to examine the circumstances in which it would be appropriate to set aside a default judgment, McDonald-Bishop JA (Ag) stated:

> "The first consideration should have been the reason for the failure of the respondent, as the defendant in the action, to appear when the case was listed to be heard. In **Grimshaw v Dunbar,** it was stated in relation to this consideration at page 354:
>
> > 'First, although there is no hard and fast rule about it, as Lord Atkin pointed out in **Evans v Bartlam** [1937] 2 All ER 650, it must be material for the learned judge to know why it was that the defendant failed to appear on the proper day when the case came into the list and was heard. How does this case stand as regards that matter?'"

[33] In this case, the appellant, being represented by someone that the learned Parish Court Judge recognised as such, was not absent and so if the learned Parish Court Judge had embarked on an enquiry along this line to seek to ascertain the

reason for the appellant's absence, given that that is the first pre-requisite for the entering of a default judgment, she would have recognized that he was, indeed, present (through his representative) at the time the judgment in issue was entered. In such circumstances, she would have realized that a default judgment could not have been properly entered. This would have put her on enquiry as to how to treat with the application that was before her.

[34] The Act does not allow for a default judgment to be entered where a representative of the defendant is present. The learned Parish Court Judge on a number of occasions had noted on the back of the summons that the appellant had a representative present. On 20 December 2016 while the appellant was absent, his representative was present.

[35] In any event, in the absence of the defendant, the learned Parish Court Judge would nevertheless have been required to proceed to a hearing or trial "on the part of the plaintiff only". What the learned Parish Court Judge should therefore have done is to have proceeded to try the matter by hearing testimony from the parties present and then arrive at a decision on the plaints.

[36] Although this appeal arose from the refusal of the learned Parish Court Judge to set aside the default judgments that had been entered, in my view, implicit in an application to set aside the default judgment, is the question as to whether the default judgments had been properly entered in the first place.

[37] A default judgment incorrectly entered in breach of the Act can be set aside as of right without the need to prove that the applicant had a good excuse for being

absent or has applied to set aside the judgment at the earliest opportunity. For these reasons, this ground of appeal succeeds.

[38] As mentioned before, I have not embarked on an extensive examination of the other amended grounds of appeal. However, I make short comments on them.

Ground B

The learned Parish Judge erred as a matter of fact and/or law and/or wrongly exercised her discretion when she found that the appellant had not provided an explanation for the delay in applying to set aside the default judgments

[39] In considering this ground it is necessary to look at the affidavit evidence of the appellant which was before the learned Parish Court Judge. It is short and so we outline it in full from paragraphs 2 onwards:

> "2. That I am a Chartered Accountant in Jamaica and a Certified Public Accountant in the United States of America.
>
> 3. That I visit the USA regularly to conduct business and to attend graduate school.
>
> 4. That I have offices located in both Kingston and Saint James.
>
> 5. That Judgment in Default was entered against me on 20th December 2016 for five (5) similar claims.
>
> 6. That my assistant, Danielle Moncrieffe, attended court on my behalf on the day that Judgment was entered in favour of the Plaintiff.
>
> 7. That the said assistant attended all prior mention dates on my behalf.
>
> 8. That my assistant did not inform me that I needed to be present on the day that judgment was entered against me.

9. That on the 20th December 2016 I was unavoidably absent from court as I had commitments to fulfil for my clients in Montego Bay.

10. That the amounts being claimed are not accurate and I owe significantly less than what is being claimed.

11. That I pray that the court will set aside the Judgment and stay execution of subsequent process until the matter can be resolved."

[40] In addressing this issue the learned Parish Court Judge stated:

> "The applications to set aside the default judgments were filed some three months after judgment was entered in favour of the [respondent]. Judgment summonses had already been filed by the [respondent] in each claim to enforce his judgments. [The appellant] has not provided an explanation for the delay in applying to set aside the judgments bearing in mind that his representative would have been present in Court when the default judgments were taken against him and he would have thus been aware of the judgments being entered in his absence in December 2016."

[41] Upon a review of the affidavit it is clear that no explanation was given for the delay in applying to set aside the default judgments and the finding of the learned Parish Court Judge was correct in all the circumstances. This ground therefore fails.

Ground C

The learned Parish Judge erred as a matter of law in finding that the appellant has not established a prima facie defence on the merit and that the appellant's defence is a bare denial

[42] In the case of **Leeman Vincent v Fitzroy Bailey** McDonald-Bishop JA (Ag) also outlined the need to establish, on an application to set aside a default judgment, a "prima facie, defence on the merits". At paragraph [28] she stated:

> "The third consideration would, of course, be the prospects of success of the respondent who was applying for a new trial. That would be to say whether the respondent had raised on his affidavit, a prima facie, defence on the merits or, in other words, at least, an arguable one or one supportable by evidence…"

[43] What did the appellant outline in his affidavit? He stated: "That the amounts being claimed are not accurate and I owe significantly less than what is being claimed".

[44] The manner in which the learned Parish Court Judge dealt with this issue is already set out in paragraph 15(d-g) above.

[45] This finding by the learned Parish Court Judge was eminently correct and cannot be faulted. The affidavit evidence of the appellant indeed reflected a bare denial. This ground also fails.

Ground D

The learned Parish Judge erred as a matter of law in finding that the respondent was prejudiced in circumstances where there was no evidence of prejudice from the respondent before her.

[46] In **Leeman Vincent v Fitzroy Bailey** McDonald-Bishop JA (Ag) outlined the need to consider, on an application to set aside a default judgment, the question of prejudice to the claimant if the judgments were to be set aside and a new trial ordered. At paragraph [25] of the judgment she stated:

> "Another relevant consideration for present purposes, and a material one identified by the authorities, is the question of prejudice to the appellant if the judgment were set aside and a new trial ordered. There ought to be a consideration whether any potential prejudice to the innocent party may be adequately compensated by a suitable award of costs. In this regard, evidence and/or submissions from the appellant would have been relevant."

[47] How did the learned Parish Court Judge address the issue of prejudice? She opined:

> "Lastly, the Court must consider the issue of prejudice to the [respondent]. This was not addressed by the defence. His claim for rental in arrears extends back to 2012, some five years previous. [The appellant] has admitted that he owes a portion of these monies in saying that the sum he owes is significantly less than the sum being claimed. He has not however stated the sum that he admits is owing such that, the Court in seeking to set aside the default judgment could enter Judgment on Admission on the admitted amount which the [respondent] could begin to collect in the interim while he awaits a trial for the sum disputed. This is particularly prejudicial, where one of the claims speaks to arrears from 2012."

[48] It is quite obvious that the respondent would have been out of pocket for a little under $5,000.000.00 in circumstances where his premises had been occupied by the appellant and the appellant had not even seen it fit to pay the amount which in his view was properly owed to the respondent. The learned Parish Court Judge was entitled to arrive at the finding that the respondent would have suffered prejudice were the default judgments to have been set aside. Therefore, this ground too fails.

Final Comments

[49] The appellant treated the plaints with scant regard. It is regrettable that after his behaviour the respondent is to suffer a further delay in collecting rental due from the appellant's occupation of the premises in question. Ground a of the appeal is clearly meritorious and in spite of the failure of the other grounds of the appeal, the appeal must be allowed. I therefore felt that the most appropriate order was that there should be no order as to costs.

Disposition

[50] In my view, the court should order as follows:

a. The appeal is allowed.

b. The orders made on 26 April 2017 by Her Honour Miss Stephany Orr are set aside.

c. The default judgments entered against the appellant on 20 December 2016 are set aside.

d. The matter is remitted to the Corporate Area Parish Court for trial before a different Parish Court Judge.

e. No order as to costs.

BROOKS JA

ORDER

a. The appeal is allowed.

b. The orders made on 26 April 2017 by Her Honour Miss Stephany Orr are set aside.

c. The default judgments entered against the appellant on 20 December 2016 are set aside.

d. The matter is remitted to the Corporate Area Parish Court for trial before a different Parish Court Judge.

e. No order as to costs.