[2014] JMCA Civ 28

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE CIVIL APPEAL NO 1/2014

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE BROOKS JA
THE HON MS JUSTICE MANGATAL JA (AG)

BETWEEN	**MCKAY SECURITY AND INVESTIGATIVE SERVICES LTD**	**INTERPLEADER/ APPELLANT**
AND	**EVERTON GREEN**	**PLAINTIFF/ RESPONDENT**
AND	**MCKAY SECURITY AND COURIER SERVICES LTD**	**DEFENDANT JUDGMENT/ DEBTOR**

Kent Gammon instructed by Kent Gammon & Co for the appellant

Ms Maxine Johnson for the respondent

21 and 23 January 2014

ORAL JUDGMENT

PANTON P

[1] We heard this appeal on the 21st of this month and postponed our decision to today.

[2] The appeal is against the order of Senior Resident Magistrate for the Corporate Area Court Ms Lyle Armstrong, made on 11 October 2012. Before her was an

application to set aside a warrant of levy and also to set aside a default judgment that had been obtained in this matter on 25 July 2005.

[3] The learned Resident Magistrate ruled that the clerk of the courts had no authority to sign the warrant of levy and that the warrant of levy that had been executed had to be vacated. However, in respect of the default judgment she ruled that, that application will not be granted and that the default judgment would remain in force but she granted leave to appeal. Now, this case is heading for its tenth year. As long ago as 12 January 2005 the respondent filed a plaint in the Corporate Area Civil Court claiming the sum of $128,280.00 being an amount which he claimed from McKay Security & Courier Services Ltd for annual vacation leave and sick leave as well as notice pay.

[4] The respondent Everton Green claimed that he had been employed to this company from 3 July 1990 until 23 August 2004 when he was summarily removed from duties by the operations manager and no further duties assigned to him.

[5] The matter came before the Corporate Area Civil Court on several occasions and the indications on the record and in the court sheets are that on 27 May 2005 someone claiming to be Alton Graham appeared representing the defendant's company. There is indication that on at least one date there was an attorney for the defendant present and eventually the matter was fixed for default judgment, firstly, on 15 July and secondly on 25 July. On 25 July default judgment was entered for the sum of $71,640.00 plus costs and interest. Now, proceedings from this: there were

two writs issued – writs of Fiere Facias issued first on 17 August 2005 when it was returned that there were no goods and another issued on 15 February 2012, this time against McKay Security Investigative Services Limited formally known as McKay Security and Courier Services Limited, that is a brief history. However, the history would not be complete unless it is also mention that eight days after the respondent was removed from duty, a letter signed by Michelle Grannum as secretary was directed to the Private Security Regulations Authority requesting that the attached list of security officers be transferred from McKay Security and Courier Services Limited to McKay Security and Investigative Services Limited and the letter indicated "Thanks for your usual co-operation". There was also an indication that on 28 December 2004 a letter was written to the Registrar of Companies requesting that the company McKay Security and Courier Services Limited be removed from the Register. However, the indications are that, that letter was not acted on until July 2011, if there is to be an understanding of paragraphs 4 and 5, particularly paragraph 5 of an affidavit filed by Jason McKay, one of the two directors of the two companies on 29 February 2012. In that affidavit Mr McKay said:

> "That the Defendant is a separate and distinct company from the Interpleader and the said companies has no relationship whatsoever."

[6] When the matter came before Her Honour, the Senior Resident Magistrate, she took into consideration the legislation that governs her jurisdiction and she stated thus:

> "It is my ruling that the Default Judgment obtained 7 years 2 1/2 months ago on July 25, 2005 should not be set aside, because:

1) There was more than sufficient time and ample opportunity to have applied to set aside the Default Judgment before February 24, 2012. This application to set aside has not been made within a reasonable time.

2) When I enquired from Counsel of the reason for the delay, Counsel submitted that they did not apply to set the Default Judgment aside 'because it was not a requirement then in 2010, because we were not required or instructed to do so and were dealing with strictly with the garnishee proceedings'.

   That, in my view, **is not a reasonable excuse.** The application to set aside has **not been made within a reasonable time.**

3) Counsel had submitted that they wished to set aside the Default Judgment because they were never served and didn't know it until 2010, when the garnishee proceeding was brought.

   Contrary to that however, is the fact of the Affidavit of Service of January 26, 2005 duly executed, signed by process server and sworn to by the Justice of the Peace.

   Counsel indicated he was seeing the Affidavit of Service for the first time.

4) On being shown the Affidavit of Service Counsel then questioned:

   a) Whether Michelle Grannum was ever served.

   b) That it proports service on her as Managing Director and she is not Managing Director.

   c) That contrary to the Constabulary Force Act Section 14 (but it's really Section 13) the document was served by a Constable Wright.

   d) That there is a notation on file to write to the Defendant.

> The response to these latter submissions is that if there were defects, these were cured by the Defendant's attendance by himself and his attorney **on more than one occasion!** The court sheet records and the file speak for themselves. In fact, the matter was before the court on at least 5 occasions before and it was only on the **6th occasion July 25, 2005,** that the default Judgment was taken. Some examples of these dates were February 18 2005, May 27 2005 when both Defendant and his Attorney were present but not ready, June 2, 2005 trial date, all parties were present and trial set for July 8, 2005 etc.
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> 5) There is nothing in either counsel's Affidavit or his submissions as to his 'Merits' i.e. in the action itself there is some prospect of his being at least partially successful – no defence good or otherwise."

Those were the reasons given by the learned Resident Magistrate.

[7] Mr Gammon, on behalf of the appellant, has repeated before us the points that he made before the learned Senior Resident Magistrate. He has in addition, stressed that there is no judgment against the appellant. The judge should have exercised her discretion in favour of the judgment debtor. He said there were triable issues of fact. The judge should have said there are triable issues. Among the triable issues that Mr Gammon mentioned was that the respondent was not employed to the appellant and in fact, he said he was referring to paragraph 4 of Mr McKay's affidavit which reads:

> "4. That as far as I know the Defendant company would give the Plaintiff from time to time some money to keep vendors off the side walk in Downtown, Kingston but the Plaintiff was not employed to the Defendant company."

However, there is abundant evidence indicating the issue of an identification card to the respondent as a security employee so it is baffling to us that the company would have issued an identification card to someone to help keep vendors off the sidewalk downtown and there are indications that this person who was supposed to be keeping vendors off the sidewalk was also signing a register at the company. So, the question of a triable issue is really not one that has any merit.

[8] Mr Gammon did stress lack of service, however, as the Senior Resident Magistrate indicated, someone did appear as a representative of the defendant company (the appellant) and in those circumstances the appellant was duty-bound to follow the proceedings. Once a representative has turned up on behalf of the company and is now aware of the proceedings, there is a duty on that part to follow the proceedings and to take the necessary steps to ensure that there is representation. There is absolutely no reason why the respondent should have been required to be attending court with regularity, with a view to giving evidence and the appellant chose not to appear.

[9] In these circumstances we are in full agreement with the Senior Resident Magistrate in refusing to set aside this default judgment. In passing, the final comment we would make is that we sincerely hope, given that letter that was written by Ms Grannum on 31 August 2004, that this is not a case of "ginnalship" because to be saying that there is no connection between the companies seem unworthy, given that letter.

[10] The appeal is dismissed and costs of the appeal of $15,000.00 to the respondent Green.