

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

Civil Division

SAINT LUCIA

Claim No. SLUHCv2019/0529

BETWEEN

DELONA DUNCAN

Claimant

-and-

[1] TAMRA ALEXANDER –SMITH

[2] RACHEL JOHN – SMITH

Defendants

Appearances:

Albert Fregis for the Claimant; and
Wauneen Louis – Harris for the Second Defendant.

2022: May 16;
June 01.

DECISION

Second Defendant's application to dispute jurisdiction of the Court

[1] **PARIAGSINGH, M** : - Before the Court is the Second Defendant's application filed on January 12, 2022 seeking an order that the Court declares that it has no jurisdiction to hear this claim or alternatively decline to exercise jurisdiction in this claim.

[2] In support of the application is the affidavit of Rachel John – Smith. In this affidavit, the Second Defendant deposes that on July 21, 2021 she was served with this claim personally except that she was not served the authorization code.

[3] The Claimant has filed no affidavit in response to this application. The Claimant did however file a document described as "Notice of Objection" which takes the form of a defence to the application on March 15, 2022, the same day the Claimant was supposed to file her submissions by. In this document the Claimant admits that on July 21, 2021

the Second Defendant was not served with the access code but contends nonetheless, that the service of the claim was properly effected.

[4] The Claimant also admits that the claim and the access code were again served on the Second Defendant on December 15, 2021.

[5] There is no dispute that the Claimant commenced two claims against the Second Defendant. The first claim bears the number SLUHCV2019/0045 and the second claim bears the number SLUHCV2019/0529.

[6] Both the first and second claim are between the same parties, relate to the same accident and claim the same relief.

[7] The first claim was not served on the Second Defendant within the time specified in Part 8 and the time for service against on the Second Defendant has expired. No application was made to extend the time for the service of the claim on the Second Defendant in the first claim.

[8] Following the period for service of the first claim expiring, the Claimant commenced the second claim on November 04, 2019^t. This claim was commenced on November 04, 2019 by claim form only. No statement of claim was filed. The claim form was not served within the six months of its life.

[9] On July 21, 2021 the Claimant 're-filed' the claim form with a statement of claim. Paragraph 1 of the statement of claim states that:

'By Order dated 19th May 2021 and entered on 14th June 2021, time was granted by the Court for the 2nd Defendant to be served with this Claim.'

[10] I have searched the Court's file in both claims. There was no such order made on May 19, 2021 in this claim. On May 19, 2021 the first claim came up for case management conference. On that day the following order was made:

‘AND UPON the Court being informed that the Second Defendant has not been served with this claim and the Claimant is engaged in discussions with the Insurer of the Second Defendant.

IT IS HEREBY ORDERED that:

- 1) Time is extended to July 22, 2021 for the parties to participate in mediation;
- 2) This matter is adjourned to July 22, 2021 at 9:00 am virtually; and
- 3) The Claimant shall have carriage of this order.’

[11] On May 16, 2022 when this matter came on for hearing due to connectivity issues, I ordered that the Claimant file and serve his submissions in response to the application by May 17, 2022 which was complied with.

[12] The thrust of the Second Defendant’s application is twofold. The Second Defendant contends that the service on July 21, 2021 was not proper service and by the time the claim was properly served on December 15, 2021, time was prescribed. The Second Defendant also relies on the rule in **Henderson v Henderson**¹ to submit that the institution of the second claim is an abuse of process.

[13] The Second Defendant submits that the same claim was already commenced against her in the first claim in almost identical terms relating to the same accident, same parties and same relief. She further submits that the Claimant not having served the first claim on her during the life of the claim form² used the Court’s process in an abusive manner by not making an application to extend the time to extend the life of the first claim but instead filing the second claim.

[14] The Claimant in response submits that the service on July 21, 2021 was proper service. She submits that the Attorney for the Second Defendant had a duty to contact the Attorney for the Claimant and ask that the access code be provided. Further, the

¹ (1843) 3 Hare 100

² Rule 8.12 (1) CPR

Claimant submits that a previous Master had given permission to the Claimant to commence the second claim.

[15] The issues which arise for determination are:

- (a) Whether there is a valid claim subsisting to be served?
- (b) Whether the service on July 21, 2021 was proper service?
- (c) Whether time was prescribed by the time the claim was properly served on December 15, 2021?
- (d) Was there an order of a previous Master granting permission of the second claim to be served?
- (e) Alternatively, whether the commencement of the second claim is an abuse of process?

RESOLUTION OF ISSUES:

Whether there is a proper claim to be served?

[16] The life of a claim form is 6 months unless it is to be served out of the jurisdiction. If it is not served within that time, it has no validity. The life of the claim form on this matter expired in May 2020. No application was made to extend the time to serve it.

[17] The Claimant purported to refile the claim form in the same claim on July 19, 2021. By that time, the life of the claim form had already expired. Refiling the claim form would not cure this defect. An application had to be made to extend the time to serve the claim. Evidence had to be put before the Court to show what steps were taken during

the life of the claim to serve it. This was not done. Simply 'refiling' the claim form in the same claim cannot circumvent the rules.

[18] In my view, the refiled documents on July 19, 2021 cannot extend the time to serve the claim. There was no valid and subsisting claim to be served on July 19, 2021 and any such proceedings was in my view a nullity.

[19] In my view, this alone is sufficient to dispose of this matter. For completeness, I will consider the other limbs of the application.

Whether the service on July 21, 2021 was proper service?

[20] St. Rose – Albertini J in the case of **Royal Bank of Canada –v- Augustin Joseph et al**³ considered the identical issue in an application to set aside a default judgment. The Court stated at paragraphs 18 and 19:

[18] **The Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) (Amendment) Rules**⁴, section 4 which amends Rule 13 of the Principal Rules⁵ provides:

“(3) Where proceedings have commenced —

- (a) service must be effected in accordance with the applicable rules of court; and
- (b) the filing party must at the same time serve the authorization code generated by the Electronic Litigation Portal in the form set out in Schedule 2.

(4) Where the authorization code generated by the Electronic Litigation Portal is not served on a party in accordance with sub-rule (3), service is deemed not to have been effected.

[19] If, in fact, Mrs. Joseph was not served with the authorization code, service would not have been effected and the first condition of CPR 12.4 would not have been satisfied, thereby causing the judgment to be irregular”

³ SLUHCM2019/0028

⁴ Statutory Instrument No. 43 of 2019

⁵ Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules, No. 87 of 2018

[21] I adopt the reasoning in **RBC v Joseph**. The submission by Counsel for Claimant that Counsel for the Second Defendant had a duty to contact him to request the access code is not tenable in my view. Firstly, this submission is based on the assumption that the Second Defendant when served had an Attorney. There is no evidence that she did. The Second Defendant's evidence is that when she was served with the papers in July 2021 she depended on her husband's niece to "check on it" for her. Her evidence, which is not challenged, is that she is of advanced age and limited means. She only heard about this matter next in December 2021 when she was served. She contends that she was unable to file any acknowledgement of service in July 2021 without being provided with the access code.

[22] Secondly, good practice, as commendable as it may be, does not negate the duty on the Claimant to ensure that proper service is effected. It cannot in my view be the duty of an Attorney representing a Defendant to contact the Claimant's Attorney to request the access code in the context of rectifying irregular service. That in my view is taking the obligation too high and imposing a reverse obligation on a Defendant to ensure that he is properly served. That is not what is intended by personal service in my view.

[23] Legislation speaks in the present tense in its interpretation. It does not speak at the time it was passed. The law on service of proceedings must be interpreted in such a manner that proper service must be in accordance with the present practice. The present practice for service is dictated in **SI 43 of 2019**. A claim commenced under the E-Litigation Portal requires the Defendant to have the access code to participate and take steps, including defending the claim. If the authorization code was not served at the same time, service is not proper, it is irregular. I agree with the reasoning of Gardner – Hypolite M in the case of **Elizabeth Smith & Anor. –v- Ivan Floyd & Anor.** ⁶ where at paragraph 29 the Court stated:

'The claimant has indicated that the authorization code was subsequently served on the first defendant on two separate occasions - April and June 2021. However, at both times the service effected on the first defendant of **only the authorization**

⁶ ANUHCv2020/0470

code without the claim form, statement of claim and accompanying documents does not accord with the requirements in the rules. The defect can be remedied but the claim form, statement of claim along with the authorization code must be served together; **Flavio Maluf v Durant International Corp BVIHCMAP2021/0025** at paragraph 86.’

[24] No doubt irregular service can be rectified, and it was rectified when the claim and the authorization code were served together on December 2021. The challenge the Claimant faces is that by then, time was already prescribed. The Court has no jurisdiction in the circumstances to make any orders to remedy irregular service.

[25] The Claimant’s submission that there is no obligation to serve the access code with the claim form only needs to be stated to be dismissed. There is such an obligation and it is contained in **Statutory Instrument No. 43 of 2019**.

[26] I find that the service on July 21, 2021 was not proper.

Whether time was prescribed by the time the claim was properly served on December 15, 2021?

[27] Prescription is different from limitation. They are distinct concepts. A complete and thorough analysis of what stops time for running was conducted by the Court of Appeal in **David Sweetnam et al v The Attorney General of Saint Lucia et al**, ⁷ where Gordon JA at paragraph 11 stated:

‘The law in St. Lucia has never been amended to harmonize with either the Quebec or Louisiana laws as amended. It must therefore follow that prescription in St. Lucia is only interrupted civilly by the commencement of a suit before a court of competent jurisdiction and the proper service of such suit on the party whose prescription it is sought to interrupt. This conforms absolutely with plain ordinary meaning of the language of article 2085’

⁷ Civil Appeal No: 42 of 2005

[28] **Articles 2085** of the Civil Code states that:

“A judicial demand in proper form, served upon the persons whose prescription it is sought to hinder, or filed and served in conformity with the Code of Civil Procedure when a personal service is not required, creates civil interruption....”

[29] It is clear that once time is prescribed both the right and remedy are extinguished and the Court has no jurisdiction. The Court having ruled that the service on July 21, 2021 was no good service, I am of the view that no proper judicial demand in proper form was served on the Second Defendant. Consequently, time did not stop running. This is a claim arising of a motor vehicle accident for which the prescription period is 3 years⁸, that is not disputed. The accident occurred on July 25, 2018. This means that time became prescribed 3 years from this date provided that there was no proper judicial demand made in proper form. A judicial demand served within this time in my view must mean that the service is proper service or else time would not be interrupted.

[30] Having ruled that the service on July 21, 2021 was not proper, I am of the view that by the time the claim was properly served, time was prescribed. Consequently, both the Claimant's right and remedy are extinguished. The Court has no jurisdiction in this matter.

Was there an order of a previous Master granting permission of the second claim to be served?

[31] In respect of this submission of Counsel for the Claimant, I have looked at all the orders made in this claim. I have also looked at all the order made in the first claim. It is a matter of the Court's record that no such order was made in this claim.

⁸ Article 2122 of the Civil Code.

[32] On October 08, 2019 it is reflected in the Master's order in the first claim that:

"AND UPON HEARING Counsel for the Claimant indicating that he intends to withdraw the claim against the Second Defendant and that he intends to refile the claim and effect service

IT IS HEREBY ORDERED that:

1
2 **The Claimant is granted leave to withdraw the claim against the Second Defendant. ..."**

[33] The above is very different from what the Claimant represented in his submissions. For the avoidance of any doubt, no permission was sought or granted by this Court or any previous Master for the second claim to be commenced.

[34] For these reasons, there is no need to go on to consider the abuse of process ground raised.

[35] On the issue of costs, there is no reason to depart from the general rule that costs follow the event. The application to strike out has determined the entire claim against the Second Defendant. Therefore, the Second Defendant cannot recover both the costs of the application and the costs of the claim. The Second Defendant shall only recover 45% of her prescribed costs on a claim of value of \$50,000.00 in the sum of \$3,375.00.

[36] In these circumstances, it is hereby ordered that:

- (a) The Court has no jurisdiction in this matter, time being prescribed;
- (b) The claimant's claim commenced on November 04, 2019 against the Second Defendant is struck out; and

- (c) The Claimant shall pay the Second Defendant 45% of her prescribed costs on a claim of value of \$50,000.00 in the sum of \$3,375.00.

**Alvin Shiva Pariagsingh
High Court Master**

By the Court,

Registrar