IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G 75 OF 2017

BETWEEN:

CYNTHIA WOODGATE

PLAINTIFF

AND

MIGUEL ANGEL ZUNIGA

FIRST DEFENDANT

AND

JESUS RIVERS-MAZOIA

SECOND DEFENDANT

IN CHAMBERS

Appearances: Ms. Yvonne Mullen of Broadhurst LLC for the Plaintiff
Mr. Paul Keeble and Ms. Sulekha Tummala of Hampson and Company for the Defendants

Heard: 12 July 2017

Before: Justice Ingrid Mangatal

Date of Judgment: 12 July 2017

Date Circulated: 13 July 2017

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EX TEMPORE RULING

1. The Summons to set aside Default Judgment, filed 26 May 2017, was filed originally on the basis that service had been properly effected on the Defendants. An Acknowledgment of Service was filed on behalf of the Defendants on the same date.

2. Prior to the entry of the Default Judgment, Hampson and Company, who act for Saxon Insurance Co., which company insures the Suzuki motor vehicle owned by the Second Defendant and which was allegedly being driven by the First Defendant at the time of an accident with the Plaintiff's motor vehicle, had been writing to the Plaintiff's attorneys to get details as to the service on the Defendants and seeking copies of affidavits of service.

3. It appears that Affidavits of Service were filed from 9 May 2017, sworn to by Mr. Worrell Williams, who claimed to have served both Defendants. However, despite Saxon's attorney's requests for copies of the Affidavits of Service, these were not provided to them by the Plaintiff's attorneys.

4. I accept Ms. Mullen, who appeared for the Plaintiff's argument, that she did not have a duty to provide copies of the affidavits of service to Saxon's attorneys. However, it seems to me that it would have been a professional courtesy to do so, and certainly it would have been proper to warn Saxon's attorneys of the intention to enter default judgment. This is particularly so, given that the Affidavits of Service were in fact provided to Saxon's attorneys, but only at the time when copies of the Default Judgments were being sent to Saxon's attorneys, , the Default Judgment now being a *fait accompli*.

5. Subsequent to the filing of the Summons to set aside, Saxon's attorney's took instructions and have filed the Affidavits of Emily Figueroa, and of the Second Defendant, both filed on 7 June 2017, contesting service on the Defendants.

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6. A further Affidavit of Mr. Williams was filed on behalf of the Plaintiff on 4 July 2017, making further explanations of the purported service.

7. The upshot of all of this, is that service of the Writ of Summons has been put in issue, and by Summons to Amend, filed on 10 July 2017, Hampson and Company now seek to amend the Summons filed 26 May 2017, to now seek to have the Judgments set aside on the basis that there has been no valid service on the Defendants.

8. By letter dated 5 July 2017, Counsel for the Plaintiff candidly conceded that there are real concerns regarding the service of the Writ of Summons and further, that they would consent to the Judgments being set aside.

9. However, the Plaintff's attorneys take two points. Firstly, they rely upon the case of ***Faircharm Investments Ltd v. Citibank International Plc*** [1998] WL 1042303, to say that if the First Defendant has no plausible Defence, and even though judgment may have been entered irregularly, if the Defendant would not be able to escape summary judgment being entered against him, the irregularly obtained judgment should remain in place. The Plaintiff's case is that she was stationary when the Second Defendant's vehicle collided with the rear of her motor vehicle and that there is no plausible Defence.

10. Secondly, Ms. Mullen refers to O.2, r.1 of the Grand Court Rules ("GCR") and the case of ***Golden Ocean Assurance Ltd*** [1990] WL 754813 to say that the failure to serve where

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the existence of the proceedings is nevertheless known to the Defendant is an irregularity which can be cured by the exercise of discretion under GCR O.2, r.1.

11. In my judgment, once it has been conceded, as it has been, that the Defendants have not been served with the Writ of Summons, the Defendants are entitled *ex debito justitiae* to have the judgments set aside. There is a long line of cases, including ***White v. Weston*** [1968] 2 QB 647 cited by Mr. Keeble, that so establishes. It follows from the fact that the Defendants are entitled to have the judgment set aside *ex debito justitiae* that they are entitled to costs of the application.

12. In my view, the case of ***Faircharm Investments*** is distinguishable because in that case the court was not there concerned with the issue of service of proceedings on the Defendants, which is a fundamental natural justice issue. Further, there have been some criticisms of that judgment - see O.13/9/8 of the **1999 White Book**. In addition, the factual basis of that case is different. In this case, the cause of action involves a motor vehicle accident, and albeit the Plaintiff says that her vehicle was hit in the rear, it cannot be said that judgment would inevitably be given for the Plaintiff on the evidence before the Court. Motor vehicle accident claims are notoriously fact sensitive.

13. It is also my view that the ***Golden Ocean*** case is distinguishable because in that case there was service of a form of acknowledgment of service which gave the title to the proceedings and listed the Defendants amongst those sued, although there was no service of the Writ of Summons. In the instant case, there has been no service on the Defendants

at all. Further, it cannot be said that the existence of the proceedings is nevertheless known, or was known to the Defendants at the date of entry of the Default Judgments. Indeed, Saxon indicates that it has not been able to get in touch with the First Defendant at all.

14. In all of the circumstances, it is in my view appropriate to set aside the Default Judgments on the basis that they were irregularly obtained, the Defendants not having been served. The Defendants are granted leave to withdraw the Acknowledgment of Service filed 26 May 2017, pursuant to GCR O.21, r.1.

15. There will therefore be an order in terms of paragraph 1(i) of the Summons filed on 26 May 2017. Costs of the application are awarded to the Defendants on the standard basis, to be taxed if not agreed.

THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT