

BENSON v. SOUTHERN FRIED CHICKEN

Supreme Court

Spry, C. J.

8 March and 11 April 1978

Service—service on firm or individual trading under a firm name — when irregularity curable — RSC Ord. 2 r.1

Judgment—setting aside—whether subsequent proceedings lapse.

Judgment — setting aside of judgment in default of appearance — setting aside on terms

A writ of summons was handed to an employee of a business carried on under a firm name in the mistaken belief that he was the manager. It was not accompanied by the notice required by RSC Ord. 81, r.3(3). Subsequently, judgment was entered in default of appearance and execution ordered.

On an application for the judgment to be set aside, it was argued for the plaintiff that the defective service was a curable irregularity. It was also submitted that even if the judgment against the defendant were set aside, judgment and a writ of fi. fa. against her mother, obtained in the belief that she was the owner of the business, should be allowed to stand.

HELD: (1) Although the service was not a nullity, the judgment must be set aside because it could not be assumed that the purported service had come to the knowledge of the defendant.

(ii) When a judgment is set aside, all proceedings flowing from it are also determined.

(iii) As there was a serious doubt as to the genuineness of the defence, the judgment would be set aside only on terms of the amount of the claim being paid into court.

Case referred to in the judgment

Westminster C.C. v. Chapman [1975] 2 All E.R. 1103.

Application

This was an application for the setting aside of judgment entered in default of appearance and a consequent writ of fi. fa., on

the ground that the service on the defendant was gravely defective.

H. K. Budhrani for the applicant/defendant.

L. Culatto for the respondent/plaintiff.

18 April 1978: The following order was read—

This is an application for a declaration that the writ of summons by which these proceedings were begun was not validly served on the defendant and for the setting aside of judgment entered in default of appearance.

The suit was brought against Southern Fried Chicken, a firm. The writ was issued on 27 October 1977. It now appears that on that day the business was owned by a Miss Yvonne Vladislavich but the plaintiff did not know this and could not have known it. According to statements delivered to the Registrar of Business Names on 13 January 1978, long out of time, Yvonne Vladislavich became a partner of the former owner, one Rodney Jonathan Solomons, on 24 October 1977 and he retired from the business the following day.

The plaintiff's solicitors purported to serve the writ on 8 November 1977. A Mr. Pons took it to the business premises of Southern Fried Chicken and handed it to a Mr. O'Shea in the belief that he was the manager of the business. Pons alleges that O'Shea held himself out to be the manager, but I do not think anything turns on this. It seems clear that the business was in fact being managed by Mrs. Elizabeth Vladislavich, the mother of Yvonne Vladislavich.

Judgment in default of appearance was given on 1 December 1977. A writ of *fi. fa.* was issued on 31 January 1978 and on 7 February 1978 leave was given to amend the summons and execution was ordered against Elizabeth Vladislavich, as well as against Yvonne Vladislavich, the proprietor of Southern Fried Chicken.

On 8 March 1978, Mr. Budhrani, for Yvonne Vladislavich, applied to have the writ of summons set aside on the ground that there had been no proper service and for the consequent setting aside of the judgment. The application was adjourned, part heard, to enable further affidavit evidence to be filed regarding the service.

It is quite clear that the purported service was defective. Not only was the writ handed to a person who had not, at that time, "the control or management" of the business, but also it was not accompanied by the notice required by RSC Ord. 81, r. 3(3).

Mr. Culatto submitted, and I accept, that by reason of Ord. 2, r. 1, the service should not be treated automatically as a nullity, but as an irregularity which the court has discretion to cure, if the interests of justice so require. The question is, how I ought to exercise that discretion.

Mr. Culatto placed much reliance on the case of *Westminster C-C. v. Chapman* (1), which was also a case of irregular service, in which the Court of Appeal held that the irregularity did not affect the validity of the proceedings. That case is, however, easily distinguishable from the present, because in that case all the defendants became aware of the summons and appeared in court in answer to it. Here, there was no appearance and there is on the record an affidavit by Yvonne Vladislavich that she had no notice of any legal proceedings before 23 February 1978. Mr. Culatto argued that it was clear from the evidence that Elizabeth Vladislavich was fully aware of the proceedings and must be assumed to have told her daughter. Faced with the affidavit of Yvonne Vladislavich, I do not think I am entitled to draw that assumption. Despite Mr. Culatto's able and persuasive argument I think the judgment must be set aside.

Mr. Culatto also asked that if the judgment against Yvonne Vladislavich were set aside, the judgment against Elizabeth Vladislavich and the writ of *fi. fa.* should be allowed to stand. With respect I do not think this possible.

Judgment was entered against Southern Fried Chicken and we now know that means against Yvonne Vladislavich trading as Southern Fried Chicken. The leave to execute against Elizabeth Vladislavich was based on the belief at that time that she was the proprietor of or a partner in the business. There has been no judgment against Elizabeth Vladislavich and if the judgment against Southern Fried Chicken is set aside, everything that flowed from it must also go.

There remains the question whether the judgment should be set aside on terms or without terms. There is affidavit evidence

by a Mr. Olivero, the plaintiff's accountant, of negotiations with Elizabeth Vladislavich both before and after their regular service of the writ, of numerous promises to pay and of dishonoured cheques. It is clear from that affidavit and from an affidavit sworn by O'Shea that Elizabeth Vladislavich was fully aware of the writ of summons early in November 1977, yet no action was taken to set it aside until 1 March 1978. An affidavit sworn by Yvonne Vladislavich in support of the present application confirms that her mother was and continues to be the manager of the business but makes no attempt to answer the allegations and there has been no indication of the nature of the defence, except a bare denial of indebtedness. These facts make me doubt very seriously whether the defence is genuine, not a mere attempt to gain time. I think therefore that it should be a term of the order that the amount of the claim be brought into court.

Accordingly, it is ordered that the judgment given on 1 December 1977 be set aside on the defendant, within 14 days, paying into court the sum of £1,830.65, being the amount claimed in the writ of summons less the sum of £50 which the plaintiff acknowledges to have received on account.