DCPI 525 OF 2007

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO.525 OF 2007

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| TSANG KA HUNG BARRY | Plaintiff |

and

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| TANG YUK LING DOBE (鄧玉玲) | Defendant |

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Coram: Before Deputy District Judge Alfred H H Chan in Chambers (Open to Public)

Date of Hearing: 17 February 2010

Date of Handing Down of Ruling: 17 March 2010

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DECISION

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1. This is the Defendant’s application to set aside an interlocutory judgment for damages to be assessed, in default of notice of intention to defend, and the final judgment in the sum of $61,000, entered against the Defendant after assessment.
2. The alleged incident from which the Plaintiff’s claim for damages for personal injury arose took place on 19 November 2005. The Plaintiff, a doctor, used to live at House No.299, Ha Hang Village in Ting Kok Road in Tai Po. The Defendant resided with her husband at the house opposite, House No.300. The Defendant’s domestic helper was walking the Defendant’s dogs at the time. The Plaintiff was on his way home. He was bitten by one of the dogs in the vicinity of his house.

**History of Proceedings**

1. On 19 September 2006, the Plaintiff sent a pre-action letter to the Defendant by registered post. On 13 March 2007, the Plaintiff issued the writ in this action with a general endorsement of claim, seeking damages for personal injury allegedly caused by the Defendant’s negligence or breach of statutory duties. On 15 March 2007, the writ was served by posting the same by registered post in a sealed envelope addressed to the Defendant at House No.300 Ha Hang Village (“the said address”), being her usual or last known address according to the Plaintiff. The letter was not returned by the Post Office through the dead post service.
2. No acknowledgment of service was filed by the Defendant. Default judgment was entered against her on 25 April 2007 for damages to be assessed. Thereafter, notices and documents relating to checklist reviews, a Statement of Damages, the Plaintiff’s witness statement, notice of hearing for the assessment of damages, hearing bundles and so on were served on the Defendant either by ordinary or registered post, unreturned, but the Defendant took no part in the proceedings. The assessment was heard on 13 January 2009 by HH Judge Marlene Ng in the absence of the Defendant. Judgment was handed down on 20 January 2009, and the Defendant was ordered to pay damages in the sum of $61,000.
3. From March to May 2009 the Plaintiff’s solicitors attempted to effect personal service of a statutory demand on the Defendant at the said address a number of times to no avail, including sending letters to her making appointments for their next visits. None of these letters were returned.
4. The Plaintiff then obtained an order for substituted service of the statutory demand, which was served by inserting a notice in the Oriental Daily on 17 July 2009. In September 2009, the Plaintiff issued a bankruptcy petition. More attempts were made by the Plaintiff’s solicitors at personal service of the petition at the said address in September and October 2009, including again sending letters of appointment by post to the said address which were not returned. An order for substituted service was granted, and the petition was served by sending the petition by ordinary post to the said address and inserting a notice in Wen Wei Po on 6 November 2009.
5. According to the Defendant, she has not resided at the said address since some time in 2006 and had no knowledge of the present action or the bankruptcy proceedings against her until late November 2009 when her brother visited the said address and found a parcel containing the bankruptcy petition which he passed on to her.

**Summons to Set Aside Default Judgment**

1. On 4 January 2010, the Defendant’s solicitors issued the present summons on her behalf seeking to set aside the judgments against her in this case.
2. The grounds of her application are: (1) that the service of the writ was irregular in that the writ was not served at her usual or last known address; (2) that she has a meritorious defence to the Plaintiff’s claim; and (3) that judgment has been entered for too much.

**Service of the Writ**

1. The Defendant claims in her affirmation evidence that in 2006 she separated from her husband and stopped residing at the said address. She is not specific about the date but she has exhibited a Chinese separation agreement by which she and her husband agreed on a separation, to take effect as from 8 August 2006, and she agreed to leave the said address. She says that by the time the Plaintiff purported to serve the writ on her in March 2007, the Plaintiff, living in the house opposite, should have noticed her absence and would have been put on inquiry as to whether the said address was still her usual or last known address. Had he attempted to check, he would have found out that she no longer lived there. Therefore, it is submitted on her behalf by Mr Yau of the Defendant’s solicitors that the said address was no longer her usual or last known address within the meaning of O.10 r.1(2)(a). She also claims that her business operations were in mainland China and she had to take frequent trips outside Hong Kong and so she was not within the jurisdiction at the time of the purported service.
2. On this last point, as to whether she was outside the jurisdiction at the time of the deemed service by registered post, she has produced no documentary evidence, e.g. of her immigration records, and I am not satisfied that she was indeed out of the jurisdiction at the time of the deemed service.
3. As to her argument that the said address was no longer her usual or last known address, Mr Damian Wong, counsel for the Plaintiff, submits that the words “usual” and “last known” must be read disjunctively, relying on Hong Kong Civil Procedure 2010 (Vol 1) para 10/1/12, and that the words “last known” mean last known to a plaintiff. The said address may not have been her usual address according to her, but it was still the address last known to the Plaintiff.
4. Mr Yau for the Defendant has referred me to *Incorporated Owners of May Moon House v Lai Mun Han Rossetti* (unrep, DCCJ 1269 of 2005, HH Judge H C Wong, 6 January 2006), in which it was held that service by leaving the writ in the letter box of the defendant’s address in the building in question was not good service when the plaintiff in that case had been told repeatedly that the defendant’s preferred address for service was her actual residential address.
5. The Defendant’s own evidence suggests that she was often away from Hong Kong before the separation, and even after the separation, she would from time to time (about once in every two months) return to the said address, although when her children were back in Hong Kong from their overseas studies, she would visit the house a little more. Her husband still resided there. In these circumstances, an outsider would not in my view have noticed anything significantly different about the Defendant’s residential arrangements, and the house at the said address would appear to remain the home of that family. I am not satisfied that the Plaintiff knew or ought to have known that the Defendant no longer resided at the said address, unlike the case of *Incorporated Owners of May Moon House* (above) where the plaintiff had ample notice of the defendant’s actual residential address. I therefore find that the said address remained her “last known address” to the Plaintiff.

**Lack of Notice of Proceedings**

1. What is more important is her allegation that she had no notice of this action until about late November 2009. I have not been referred by either party to the relevant authorities on this issue. Mr Wong for the Plaintiff submits in his skeleton argument that the issue is not whether the Defendant actually resided at the said address, or even whether she actually received the writ, but only whether the said address was the one last known to the Plaintiff.
2. I do not agree. The test for good service of a writ is not whether the writ has been delivered to the address, but whether the proceedings have been brought to the notice of a defendant: *Forward v West Sussex County Council* [1995] 1 WLR 1469; *Cosec Nominees Ltd v Lau Hon Ming Alan* [2001] 3 HKC 290.
3. The Defendant has stated in her affirmation evidence that she did not know about the proceedings until late November 2009. She had separated from her husband since about August 2006 and has exhibited the separation agreement. Her husband’s current domestic helper has also sworn an affidavit to the effect that she started her service at the said address in early 2009 and the Defendant’s husband had instructed her to put all the letters and parcels in his room. The Defendant has also been told by the previous domestic helper who has since returned to Indonesia that she was given the same instructions by the Defendant’s husband. The Defendant says that she only realised recently that letters addressed to her had been passed on to her husband on his strict instructions, and not to her, the implication being that her husband had for whatever reason failed to pass on the correspondence to her.
4. The Plaintiff, in opposition to the present application, has adduced evidence about the letters and notices which his solicitors sent to the said address by post, none of which were ever returned. There is also evidence of how the Plaintiff’s process-servers attempted personal service of the statutory demand and the bankruptcy petition at the said address, of how the process-servers were told by the Defendant’s daughter or a domestic helper that the Defendant was not at home or was in mainland China but would return to Hong Kong later, but never that the Defendant no longer resided there. On one occasion, a copy of the statutory demand was also left with the daughter. The purpose of the evidence is to show that the Defendant has been trying to evade service all along, and that she must have learnt about the action against her earlier than she is now prepared to admit. This in turn throws doubt on the Defendant’s assertion that she never received the writ.
5. The Plaintiff also says that between March 2007 (when the action was commenced) and September 2007 (when he moved out of House No.299), he saw the Defendant in the vicinity of House No.300 on many occasions. His sister Tsang Yee Wah has also made an affirmation. She lived and still lives at House No.302. She says that there has been no difference in the frequency of her seeing the Defendant in the village before and after August 2006, when the Defendant is supposed to have separated from the her husband.
6. The Defendant, on the other hand, in her affirmation in reply, says that she has been informed by her daughter that her daughter did inquire about the identity of the relevant process-servers and ask them to divert all letters to the Defendant’s new address in Sheung Shui, but the visitors refused to disclose their identities and left without any messages for the Defendant.
7. The relevant issue before me is whether the Defendant received the writ, before default judgment was entered against her, and not whether subsequently she evaded service of the statutory demand and bankruptcy petition, although evidence relating to the latter issue may affect my consideration of the first issue. The court is not bound to accept any assertion, however improbable, by a defendant, and the onus is on a defendant to satisfy the court by convincing evidence that he did not receive the writ, despite its having been sent by post, unreturned, to the his usual or last known address: see *Forward v West Sussex County Council* (above); *Bank of China (Hong Kong) Ltd v Cheung King Fung, Francis* (unrep, CACV 66 of 2005, 22 July 2005).
8. Mr Wong submits that it is highly doubtful that the Defendant was telling the truth about her having moved out of the said address, in the light of (1) the fact that none of the letters sent by the Plaintiff’s solicitors were returned, and (2) the answers given by the Defendant’s daughter and the domestic helper to the process-servers, none of which suggested that the Defendant was no longer residing at the said address.
9. In considering the evidence, I am mindful that I am not in a position to resolve disputes of fact, and I do not intend to. I do bear in mind that the burden is on the Defendant to satisfy me convincingly that she did not receive the writ. It cannot be disputed that numerous letters and notices, including the writ, were sent to the said address, unreturned, over a period of over 3 years (from the letter before action which was sent in September 2006, just after the alleged separation). The effect of the Defendant’s account is that all of these letters and parcels for her had been passed on by the domestic helpers to the husband who simply failed to give them to the Defendant. No reason has been provided by the Defendant in her affirmations as to why her husband might have done that.
10. In her first affirmation in support of the summons, what she says about her husband, apart from their “frequent disputes” and the separation, is that he was also very busy and was out of Hong Kong more often than not. It is not clear what exactly the purpose of giving that piece of information was, but one is left with the impression that the postal package enclosing the writ may have escaped the notice of the husband because of his very busy schedule.
11. The Plaintiff then filed his affirmation evidence in opposition, which refers to the numerous letters and notices sent to the Defendant by post, unreturned. That was quite a large amount of correspondence for the husband to have missed.
12. Then came the evidence in reply from the current domestic helper that the Defendant’s husband had given “strict instructions” that all correspondence should be left in his room. The effect of this evidence is, since the Defendant does not admit having received any of these letters, that the husband must have withheld them from the Defendant. In that case, she must have been shocked, after reading the Plaintiff’s affirmation in opposition, to find for the first time that her husband had kept all this important correspondence from her. Yet in her own affirmation in reply she has not told the court whether she confronted or at least inquired of her husband about this matter after she learnt about this serious lapse (deliberate or not) on his part, and what answers if any he may have given. The frequent disputes between them and their separation do not necessarily explain why the husband might have withheld the correspondence from her, especially when the Defendant’s own evidence suggests that she and her husband have managed to separate from each other on mutually agreeable terms, and she was able to go back to the said address to see the children without incident.
13. If she could not get any help from her estranged husband, she could have produced evidence of her own relating to her alleged move. Noticeably missing is any evidence of the following: what arrangements, if any, she may have made about forwarding her correspondence to her new address; any notifications she may have given to other parties (such as her banks) about her change of address; any correspondence she may have received at her new address in Sheung Shui (the full address of which has not been disclosed in her affirmations), after residing there since August 2006; any tenancy agreement or title documents relating to her new residence if she has been renting it or has bought it. If she had been living at another address since August 2006, one would have expected at least some of this evidence from her. There is none.
14. In short, her account that she never received the writ because she had moved out of the said address leaves a lot of obvious questions unanswered. It is a distinctly unconvincing account. I am not satisfied on the evidence filed in this case that she did not receive the writ. It follows that she has failed to show that the default judgment was irregular. In order to set aside the judgment, she would have to show a meritorious defence.

**Defence**

1. I will first deal with the submission by Mr Yau for the Defendant that judgment has been entered for too much. The thrust of his argument is that the injury suffered by the Plaintiff is relatively minor, and the amount of damages in the sum of $61,000 is too high. This ground usually applies to situations where the amount can be shown by undisputed evidence to have been too much. Where a defendant contends that the amount ordered to be paid is more than is due, it is more a matter of defence for which the defendant should provide some evidential or legal basis for impugning the amount so ordered. HH Judge Marlene Ng, in a typically meticulous judgment, rejected a number of the Plaintiff’s claims, and allowed a sum of $50,000 for PSLA and $11,000 for other losses. Mr Yau has not shown me any personal injury precedents which shows the learned judge may have erred, apart from his very general argument that the Plaintiff’s minor injury does not merit the amount of damages ordered.
2. Dealing with the alleged incident itself, the Defendant herself was not present. She relies on what she has been told by the domestic helper at the time, a Miss Ida Susiana, who has since returned to Indonesia. Miss Susiana was walking the two dogs when she paused to speak to another domestic helper. The Plaintiff approached the dogs and hit them intentionally. The dogs then barked at him but she held the leashes tight and kept the dogs under control. She did not see the dogs bite him. The Defendant also refers to a prior incident in which a neighbour allegedly saw the Plaintiff throw a flower pot at the dogs who were barking at the Plaintiff and a female companion of his. The purpose of the evidence is to show a possible motive for the Plaintiff to hit the dogs on the day in question.
3. According to the Defendant, she spoke to Miss Susiana on the telephone in late December 2009 and late January 2010 and the latter indicated that she was prepared to make a statement or affirmation in support of the Defendant’s application. A draft affirmation was then prepared for it to be made in Indonesia, for the purpose of filing it in the round of affirmation evidence in reply, but the Defendant had not been able to get in touch with Miss Susiana again by the time of the hearing of the summons on 17 February 2010.
4. Mr Wong for the Plaintiff, while accepting that the court may still rely on the hearsay evidence from the Defendant, criticises the alleged defence, in that all it amounts to is a bare allegation that the dog bite did not occur, which is contradicted by the Plaintiff’s medical evidence of another doctor who treated the Plaintiff on the same day, and the Plaintiff’s report the following day to the Agriculture, Fisheries and Conservation Department. Mr Wong submits that the defence has no real prospects of success.
5. However, even if the dog bite did occur, the allegation of the Plaintiff’s provocation of the dogs, if true, could potentially provide a defence that the Plaintiff’s injury was caused solely by his own act, or partly as a result of his contributory negligence. I do find the Defendant’s account of the incident as allegedly related by Miss Susiana slightly unsatisfactory, in that Miss Susiana’s allegation that she had kept control of the dogs and did not see the dogs bite the Plaintiff seems inconsistent with the Plaintiff’s injury, albeit minor. Nevertheless, the outcome will ultimately depend on whose account is believed and the credibility of witnesses, and the Defendant’s case is one which could well be established at trial.

**Orders**

1. In these circumstances, I am inclined to set aside the judgment against the Defendant but on condition that the Defendant pay $61,000 into court within 14 days from today. The reasons I have decided to impose the condition are (1) that there are reasonable grounds to believe that the Defendant may have tried to evade service on her; and (2) that despite having found out about these proceedings in late November 2009, the Defendant has left the important evidence of Miss Susiana to a rather late stage, i.e. to the round of affirmation evidence in reply, and as a result the court has been left without a precise account from the witness herself, and instead has had to rely on a hearsay account from the Defendant which is not entirely satisfactory.
2. The Defendant having failed to show that the judgment entered was irregular, I also make an order nisi that the Defendant should pay the Plaintiff in any event the costs of these proceedings so far including the costs of the enforcement proceedings, to be taxed if not agreed, with no certificate for counsel for the hearing on 17 February, 2010.

Alfred H H Chan

Deputy District Judge

Mr Damian Wong, instructed by Paul C W Tse & Co for the Plaintiff

Mr Jimmy M F Yau of Y S Lau & Partners for the Defendant