COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2020/CLE/gen/FP/00031

B E T W E E N

DENISE WILSON

Claimant

AND

MONICA SMITH

Defendant

Before:	The Honourable Justice Andrew Forbes
Appearances:	Cassietta Mcintosh-Pelecanos, for the Claimant
	Nicolette Burrows, for the Defendant
Hearing Dates:	9th May, 2024

RULING

FORBES, J

This is a decision dismissing the Defendant's Application to set aside the Judegment and Order filed on 4 November, 2022 and 16 October, 2023.

INTRODUCTION

[1.] This application began by way of Notice of Application ("Application") filed on 18 December, 2023. The Notice of Application was supported by the Affidavit of Monica Smith filed on 18 December, 2023.

[2.] The Application sought the following relief:

a. That the Order for substituted service granted on the 21 October, 2022 and filed on the 4 November, 2022 be set aside;
b. That the Order/Judgement granted on the 8 September, 2023 and filed on 19 October, 2023 be set aside.
c. That the Plaintiff vacates the Defendant's property situate 28 Garnet Lane in Freeport, Grand Bahama, The Bahamas;
d. That leave is granted for the Defendant to file and serve trial documents on the Plaintiff;
e. That the Court provides a trial date for the matter to be heard; and
f. Any other Order that the Court deems fit and reasonable under the circumstances.

[3.] The 'grounds' on which the Defendant makes this application relies do not relate to any specific rule in the Supreme Court (Civil Procedure) Rules, 2020 ("CPR"). However, the grounds laid out, in brief, are as follows:

a. That on 5 occasions between 14 September, 2022 through 21 October, 2022 the Plaintiff attempted to serve the Defendant at her residence with trial documents.
b. That after a month of attempted service the Plaintiff moved for an *ex parte* application for substituted service relying solely on the Affidavit of Attempted Service of Superintendent Cedric Domonic Wilson filed on 21 October, 2022;
c. That the Plaintiff must comply with the doctrine of full frank disclosure when making an application without notice and that the Plaintiff withheld material facts to the Defendant's whereabouts;
d. That had the Plaintiff disclosed those material facts the Process Server would have the necessary information to ascertain the whereabouts of the Defendant.
e. That the Court would have arrived at an alternative position had the 'material facts' been disclosed;
f. That there was no indication that the Defendant was off the island nor outside of the jurisdiction at the times of service. That the 5 times at attempted service over the course of one month was not unreasonable and is no insufficient ground to justify substituted service;

g. That the Plaintiff ought to make reasonable inquiries based on her knowledge of the Defendant and the Defendant's family to ascertain the Defendants whereabouts for service and that the best endeavours were not made nor exhausted;
h. The Defendant has no knowledge of attempted service of trial documents nor the notice of trial that was published in national dailies. That the Plaintiff knew or ought to have known that the said dailies have not been in circulation since 2019 and were not physically accessible to the Defendant while in Grand Bahama.
i. The Affidavit relied on by the Plaintiff was insufficient to justify substituted service of the trial documents.
j. That the **trial** was held in the absence of the Defendant on the 8 September, 2023 ('Order') and the Court having **heard the evidence of the Plaintiff** granted Judgment against the Defendant in the sum of $217, 808.00 with cost and interest;
k. That the Order does not make any provisions for the Plaintiff to occupy the property of the Defendant which the Plaintiff continues to occupy.
l. That the Defendant was not aware of the trial date and did not deliberately avoid service of trial documents. That the Defendant was only made aware of the trial date after her change of attorney in October of 2023.
m. That the Defendant would have attended court had she been aware of the trial and it is imperative that the Defendant is afforded an opportunity to articulate her Defence and Counterclaim.

The Defendant then states that the evidence that would be used at trial is the Affidavit of Monica Smith filed on 18 December, 2023.

EVIDENCE

[4.] The evidence in support of the Application is the Affidavit of Monica Smith filed on the 18 December, 2023 and the Supplemental Affidavit of Monica Smith filed on the 6 May, 2024 (together referred to as the "Affidavits in Support"). The Affidavit mirrored the 'grounds' of the Application; however, in brief, the salient points of the Affidavits in Support are as follows:

a. That she is the Defendant in the matter and the Affidavits are made in support of the Application.
b. That she read the Affidavit of Attempted Service and notes that Superintendent Cedric Dominic Wilson alleges that service of the trial documents was attempted between 14 September, 2022 through the 21 October, 2022.
c. That she is the legal and beneficial owner of an Apartment complex situated 28 Garnet Lane, Freeport, Grand Bahama and she resides in Unit 105. That the aforementioned address is her primary residence.
d. That her usual routine involves drop off and pick up of her grandchildren and that she also runs errands for and assists with her daughter and daughter's business, respectively.

c. That she had no knowledge of the attempted service and that the Superintendent did not describe the make and model of the vehicle he saw, but does not deny that one or all of her vehicles would have been in the yard.
f. That she does not recall her whereabouts on the 22 September, 2022; however, around 3:39pm she would have been collecting her children
g. That previously she had complied with service.
h. That the service was not attempted at any other place nor exhausted and that she verily believes the Affidavit does not have sufficient ground for substituted service.
i. That the Plaintiff was not forthcoming with material facts such as the fact that the Plaintiff resides in the apartment next to hers, her whereabouts nor any competing considerations.
j. That if the Plaintiff was forthcoming with the material facts the Court would not have been satisfied that it was impracticable to personally serve her.
k. That the method of Substituted Service was not available to the Defendant because the Nassau Guardian and The Tribune have not been in circulation from 2019 and would not be available to the Defendant at the time
l. That she had good reason for failing to appear at trial as she did not have proper Notice.
m. That she relies on her Defence and Counterclaim filed on the 1 July 2021 that had she attended the trial the Court would have made some other alternative order and that the Order/Judgment made on the 16 October, 2023 would not have been made.

[5.] The Plaintiff relies on the Affidavits of Service made by Shanice Russell and the Affidavits of Service made by Arlene Watson both filed on the 15 December, 2023.

[6.] In brief the Affidavit of Shanice Russell states that on 14 December, 2023 at 12:30 pm the Defendant was served with the Order dated the 16 October, 2023 at the office McIntosh and Co. That the Defendant produced identification to her. Annexed to the affidavit was the National Insurance Board card of the Defendant.

[7.] The Affidavit of Arlene Watson states that on 31 of October, 2023 at 4:16 am the Order was served on the law firm of the representative for the Defendant the Order filed 16 October, 2023. That Ms. Nicholette Burrows received the email that was previously sent on the 18 October, 2023. Annexed were the exchange of emails.

SUBMISSIONS

Defendant's Submissions

[8.] The Defendant has laid over Skeleton Arguments, Supplemental Skeleton Arguments and Submissions on behalf of the Defendant. The Court seeks to relay the salient points below.

[9.] Counsel for the Defendant submits:

a. That the Plaintiff did not take all reasonable steps to personally serve the Defendant before seeking substituted service.
b. That "substituted service" is now known as "alternative methods of service" as codified in Part 5 and 6 of the CPR and that the Plaintiff is under an obligation

to demonstrate that the Plaintiff took all reasonable steps pursuant to Rule 5.14(2)(a)

c. That it was not impracticable to personally serve the Defendant, nor ascertain the whereabouts of the Defendant.
d. That the method of substituted service ordered was not sufficient because it would not cause the document to come to the notice of the Defendant.
e. That the Plaintiff is compelled by the doctrine of full and frank disclosure (see **Attorney General of the Commonwealth of The Bahamas v Pierino Zanga et al** 2020/CLE/gen/00424) and that failure to comply will result in the deprivation of any advantage obtained in the breach of that duty.
f. That it is mandatory for the Plaintiff to make proper inquiries and that treasonable steps taken in the past were not made in this instance.
g. That the Court has the discretion to set aside an Order at any time (see **Riverpath Properties Ltd. V Brammall (2000) Times, 16 February** [2001 All ER (D) 281 (Mar).
h. That the service on 31 October, 2023 is not good service pursuant to the requirements of Rule 5.6 as the purported service is prior or inconsequential.
i. That the authority to accept service cannot be inferred and that authorization to accept service is to be expressly made in writing. Further, that an attorney communicating with the Defendant's attorney does not give rise to an obligation to accept service (see **Smith v Probyn and Another** [2000] All ER (D) 250.
j. Admits service on the 14 December, 2023
k. That should the case be reheard the Court would not come to the same conclusion as it had prior.

ISSUES

[10.] The issues to be determined are:

a. whether the Court has the jurisdiction to set aside the order pursuant to Part 11 of the CPR;
b. whether the Court has jurisdiction to 'rehear' this matter pursuant to section 39.5 or in its inherent jurisdiction;
c. If the Court has the Jurisdiction to 'rehear' this matter pursuant to Rule 39.5, whether the Defendant has satisfied the Court of the requirements of Rule 39.5 that the Defendant had good reason for not attending that date and that had the Defendant been present at that date some other order would be made; and
d. Whether the Court can grant any other relief as requested by the Defendant?

Issue 1: whether the Court has the jurisdiction to set aside the order filed 4 November, 2022 pursuant to Part 11 of the CPR?

[11.] Counsel for the Defendant made submissions to set aside the Order for Substituted service pursuant to Part 11 of the CPR.

[12.] Rule 11.8 sets out the procedure and general requirements to set aside and vary an order made on application made without notice. It states:

11.8 Application to set aside and vary order made on an application made without notice.

(1) The general rule is that the applicant must give notice of the application to each respondent.

(2) An applicant may make an application without giving notice if this is permitted by —

(a) a practice direction or

(b) a rule.

(3) The applicant need not give evidence in support of an application unless it is required by a —

(a) court order;

(b) practice direction; or

(c) rule.

(4) Notice of the application must be included in the form used to make the application.

[13.] The definition of application is taken from Rule 11.1 which states "This Part deals with interlocutory applications for court orders being applications made before, during or after the course of proceedings".

[14.] Moreover, Rule 11.18 states the requirements for the application:

11.18 Application to set aside and vary order made on an application made without notice.

(1) A respondent to whom notice of an application was not given may apply to the Court for any order made on the application to be set aside or varied and for the application to be dealt with again.

(2) A respondent must make such an application not **more than fourteen days after the date on which the order was served on the respondent.**

(3) An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule, and the time within which it must be made.

[Emphasis Mine]

[15.] An application pursuant to this section acts as a rehearing of the application rather than a review of the order itself (see **Hashtroodi v Hancock** [2004] EWCA Civ 652. Further, where it is more unjust to vary or set aside the order or the Court deems that it is unlikely that a change to the order would be made, it can refuse to exercise its power pursuant to this section (see **Riverpath *supra*).** This Court finds that the time requirement as stipulated in 11.18 is mandatory. Further, had the Defendant been present to court at any stage of the course of the proceedings there would be no need for the Order filed 4 November, 2022 and it would be unjust to set aside the Order for substituted service when there has been a final judgement made. Therefore, the Court refuses to exercise its power pursuant to Rule 11.18. For completeness this Court expands on its consideration below.

Substituted Service Order

[16.] The Law regarding substituted service at the time was Order 61 Rule 4 which states :

> 4. (1) If, in the case of any document which by virtue of any provision of these Rules is required to be served personally on any person, it appears to the Court that it is impracticable for any reason to serve that document personally on that person, the Court may make an order for substituted service of that document.
>
> (2) An application for an order for substituted service may be made by an affidavit stating the facts on which the application is founded.
>
> (3) Substituted service of a document, in relation to which an order is made under this rule, is effected by taking such steps as the Court may direct to bring the document to the notice of the person to be served.

[17.] This application was made *ex parte* as a result of the Defendant's apparent evasion of service and, by default, was made in the absence of the Defendant.

[18.] However, to grant an Order for substituted service the Court must abide by Order 61 Rule 4. To satisfy the Court that the Order is to be set aside, the Defendant must then prove the adverse to Order 61 Rule 4 - i) that it was practicable to serve the Defendant and ii) the method of service would not have brought notice to the Defendant about the documents being served.

[19.] Firstly, what is considered impracticable is at the discretion of the Court and does not rely on the promptness of the personal service of the documents (see. **Paragon Group Ltd v Burnell** [1991] 2 All ER 388; **Porter v Freudenberg** [1915] 1 K.B. 857. This Court, in exercising its discretion, was then, as is now, satisfied that it was impracticable to serve the Plaintiff as the process server attempted multiple times, over the course of a month, and failed due to what appeared to be evasion of service. Moreover, based on the Pleadings in the matter and the Affidavit of Attempted Service the Court was aware of the alleged 'omitted material facts' concerning the Plaintiff's and Defendant's proximity to one another. Further, as it was eluded to by the Affidavit of Attempted Service, the Defendant was evading service. The Court admits that the affidavit relied on in the application for substituted service is silent as to whether the Superintendent made inquiries of the Defendant's family or workplace. However, it is blatant that when the Superintendent made his attempts to serve the documents, he received information from the Plaintiff that the Defendant was in her home. Therefore, in this regard the Court had determined that personal service of the documents was not practicable.

[20.] Moreover, in regard to the method of service, in the Defendant's Counsel submissions, she argues one point to whether the method of service was sufficient. The Defendant in her affidavit states the Nassau Guardian and the Tribune were not in circulation on the island of Grand Bahama, which simply is not the case. Both newspapers were in circulation on the island of Grand Bahama post the closure of the Freeport News in 2019. Therefore, the manner in substituted service by way of advertisement in the Nassau Guardian or Tribune as directed by this Court ought to have brought the documents to the notice of the Defendant. The Defendant in her Affidavit did not make assertions that she does not read the papers and, consequently, that she would not have been made aware even if the paper was in circulation.

[21.] The Court need not be made aware of whether the Defendant actually became aware of the documents due to the Substituted service, the test of the manner of service as correctly

stated by the Defendant's Counsel is whether the Court is satisfied that the method chosen would bring the document to the notice of the Defendant. Therefore, this Court was satisfied in that regard and made its order on that basis. The Plaintiff filed an Affidavit of Compliance on the 6 September, 2023 having abided by the Substituted Service Order. Therefore, the date of service would be from the 6 of September, 2023.

[22.] Nonetheless, the Defendant in the Affidavit filed on 18 December, 2023 states at paragraph 23 that she was made aware of the substituted service Order in October of 2023 once she engaged the firm of Twenty Twenty & Associates. Further in the Affidavits, that she engaged the said firm on the 18 October, 2023. Therefore, even if the Court was minded to consider setting aside the order for substituted service the Defendant has not complied with Rule 11.18 (2) as this application was made on 18 December, 2023. 14 days from the 18 October, 2023 would have been the 2 December, 2023. The Court cannot exercise its powers pursuant to this application as the Rule 11.18 is not complied with. Further, even if it could it would not be just to do so.

Issue 2&3: Whether the Court has jurisdiction to 'rehear' this matter pursuant to Rule 11, Rule 39.5 or in its inherent jurisdiction; If the Court has the Jurisdiction to 'rehear' this matter pursuant to Rule 39.5, whether the Defendant has satisfied the Court of the requirements of Rule 39.5 that the Defendant had good reason for not attending that date and that had the Defendant been present at that date some other order would be made;

[23.] Generally, where the Court makes a final judgement that is perfected the doctrine of *functus officio* is applied and adhered to. Per *Burnett, LJ* in the case of **Regina (Demetrio) v. Independent Police Complaints Commission; Regina (Commissioner of Police of the Metropolis) v. Independent Police Complaints Commission** [2015] EWHC 593 (Admin) it was held:

> 36. Functus officio means no more than that a judicial, ministerial or administrative actor has performed a function in circumstances where there is no power to revoke or modify it. It is a Latin tag still in universal use and usually abbreviated to the short statement that someone is functus…

[24.] Further, *Fry LJ* in **Re Riddell, exp Strathmore (Earl)** (1888) 20 QBD 342 held 'Nothing can be a **final judgement** by which there is not **a final conclusive adjudication between the parties of matters in controversy in the action**.' A judgement is final and cannot be changed once perfected, as it was held in the case of **Re L and another (Children) (Preliminary Finding; Power to reverse)** [2013] UKSC 8, in which *Lady Hale* stated that 'there is jurisdiction to change one's mind up until the order is drawn up and perfected' and that jurisdiction to do so is guided by the objective 'to deal with the case justly' while still exercising his discretion 'judicially and capriciously' but to also know that every case is dependent on the circumstances and a 'carefully considered change of mind is sufficient.'

[25.] Therefore, the Court determines that the Order filed on the 16 October, 2023 is a final judgment on the matters concerning these parties. However, the CPR have made ways in which a final judgement can be set aside. Namely, by way of Rules 11.8, 11.18, 26.6 and rule 39.5. As the rules in Part 11 were discussed previously and somewhat mirror the requirements in 39.5 the latter two rules listed are reflected below.

[26.] Rule 26.6 states:

26.6 Setting aside judgment entered after striking out.

(1) **A party against whom the Court has entered judgment under rule 26.5 when the right to enter judgment had not arisen may apply to the Court to set it aside.**
(2) If the right to enter judgment had not arisen at the time when judgment was entered, the Court must set aside judgment.
(3) If the application to set aside is made for any other reason, rule 26.8 applies.

[Emphasis Mine]

[27.] For clarity Rule 25.5 (as referred to in 26.5) is reflected below:

26.5 Judgment without trial after striking out.

(1) **This rule applies where the Court makes an order which includes a term that the statement of case of a party be struck out if the party does not comply with the "unless order" by the specified date.**
(2) If the party against whom the order was made does not comply with the order, any other party may apply for a judgment to be entered and for costs to be assessed appropriate to the stage that the proceedings have reached.
(3) **A party may obtain judgment under this rule by filing a request for judgment.**

[Emphasis Mine]

[28.] The Court notes that this rule cannot apply as the judgement was not obtained by an application by the Plaintiff. Rather it was obtained by the Court hearing the evidence at trial.

[29.] Rule 39.5 was called upon in the Submissions of Counsel and as such the Court refers to it below.

39.5 Application to set aside judgment given in party's absence.

(1) A party who was not present at a trial at which judgment was given or an order made may apply to set aside that judgment or order.
(2) The application must be made within fourteen days after the date on which the judgment or order was served on the applicant.
(3) The application to set aside the judgment or order must be supported by evidence on affidavit showing —
(a) a good reason for failing to attend the hearing; and
(b) that it is likely that had the applicant attended some other judgment or order might have been given or made.

[30.] This rule in essence gives the Court the jurisdiction to set aside an Order made in the absence of a party if the Applicant i) was served with a judgement or order that was made in their absence, ii) the application was made within 14 days of the service of the Order and iii) an affidavit supporting the application shows good reason for failing to appear as well as that some other judgement or order would have been made or given had the applicant appeared

Order For Final Judgment

[31.] It is clear that based on the Order filed on the 16 October, 2023, that judgement was entered in the absence of the Defendant. Therefore, the only issues that arises is whether the application was made within 14 days of service of the order and whether there would have been good reason for failing to appear as well as that some other judgment or order would have been made or given had the applicant appeared.

[32.] Two of the issues raised by Counsel for the Defendant in her Supplemental Submissions was 'whether electronic service of the Order/Judgment on the attorney is good service?' and 'when was the Order served on the Defendant.' The Court notes that the Affidavit of Service filed on 15 December, 2023 and made by Shanice Russell, demonstrates that service of the Order was effected personally on the Defendant at the Plaintiff's Counsel's firm on 14 December 2023. Exhibited was the photo identification produced to the affiant by the Defendant. Further, an Affidavit of Service filed on the 15 December, 2023 made by Arlene Watson states that the Order was sent to the Defendant's Counsel via email on the 18 October, 2023 and received by Defendant's Counsel on the 31 October, 2023. Exhibited were the emails as described. It is noted that on the 23 October, 2023 Counsel filed the Notice of Change of Attorney.

[33.] Rule 6.2 states the methods of service as the following:

> If these Rules require a document other than a claim form to be served on any person it may be served by any of the following methods —
>
> (a) **any means of service in accordance with Part 5;**
>
> **(b) leaving it at any address for service in accordance with rule 6.3(1); or**
>
> (c) other means of electronic communication if this is permitted by a relevant practice direction;
>
> unless a rule otherwise provides or the Court orders otherwise.
>
> [Emphasis Mine]

[34.] The judgement made on 8 September, 2023 and perfected on 16 October, 2023 was post CPR and thus ought to be served pursuant to the parameters of the CPR. As stated in Rule 6.2 service could be effected by any means described in Part 5 of the CPR. Therefore, the Court notes Rule 5.5 permits personal service and describes the relevant information required for personal service (to which this Court is satisfied). Further, the CPR, Rule 5.6 allows for service on the attorney as well as service by electronic means pursuant to Rule 5.12.

[35.] Therefore, it is the Court's view that electronic service on Counsel for the Defendant was not effected on 31 October, 2023 by means of electronic delivery to the Defendant's Counsel. This is for two reasons i) due to the fact that the Plaintiff did not adhere to 5.12 (2)a which mandates that the affidavit of service exhibit a copy of the document that was served and ii) the Order was attempting to be served on Counsel before she was properly placed on record regardless if she was retained on behalf of the client. The Court does not accept that the Defendant did not authorize her Counsel to accept service of documents.

[36.] However, the Court finds that personal service was effected on the Defendant on 14 December 2023. Moreover, 14 clear days from the date of service (14 December, 2023) would be the 29 December, 2023. The Defendant filed this application on the 18 December, 2023, four days after the date of service of the Order, which is in compliance with Rule 39.5.

[37.] Further, the last limb of the rule requires the Applicant, in this instance the Defendant, to prove that had the Defendant been present it is likely that the Court would've come to a different judgment. As the Defendant alleges, she was not made aware of the substituted service order.

[38.] This Court, having note that the Defendant has not complied with any of the Case Management Conference Order, nor after being served with the Judgment now, has not made any attempt to produce to the Court any Witness Statements, documentary evidence, Pleadings, *et cetera* required for trial. There is an application made for leave to file and serve trial documents, however, none of the aforementioned is before the Court for consideration. The Pleadings presented to this Court without evidence doesn't cause the Court to believe that its decision to strike the Defence, due to its noncompliance with the CMC Order, and grant the reliefs requested would be any different.

[39.] The Court, therefore, is of the view that the Order made would not have changed even if the Defendant was present at trial and, therefore, refuses this application.

Issue: 3:Whether the Court can grant any other relief as requested by the Defendant?

[40.] As previously stated, once a Court is *functus* it cannot change nor vary its order. Therefore, due to the fact that the Court does not accede to the application and, thus, does not have jurisdiction to set the Order perfected on the 16 October, 2023, it cannot grant any further relief sought by the Defendant.

Disposition

[41.] The Court does not have the jurisdiction to set aside the judgment made on 21 October, 2022 and perfected on 4 November, 2022 pursuant to this application due to non compliance with Rule 11.18 (2) and that the appropriate forum would be that of the Court of Appeal.

[42.] The judgement made on 8 September, 2023 and perfected on 16 October, 2023 is a final judgment that does satisfy the requirements of Rule 39.5. the Court is not satisfied that the judgement would have differed had the Defendant been present due to her noncompliance with the Case Management Order. Therefore, the requirements of Rule 39.5 is not satisfied and the application is refused.

[43.] Finally, the Court does not have the jurisdiction to grant further relief to the Defendant as it is *functus*. Application refused

[44.] Costs for the Plaintiff to be taxed if not agreed.

Dated the 4th July, 2024

Andrew Forbes
Justice of the Supreme Court