IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 109 of 2008

BETWEEN : Skylite Productions (Fiji) Limited

PLAINTIFF

AND : Neil Foon

DEFENDANT

COUNSEL : Mr. Diven Prasad for the Plaintiff
Ms. A Rokomokoti for the Defendant

Date of Judgment: 6 September 2013

JUDGMENT

1. There are two applications before this court filed by the Defendant and the Plaintiff.

2. The Defendant's application is to set aside the default judgment entered against him on 23 July 2009 and or to stay of execution of summary judgment for assessment of damages entered on 6 June 2010.

3. The Plaintiff filed summons under Order 2 and Order 18 of the High Court Rules to strike out the inter-partes summons filed by the Defendant.

Facts Pertaining to the Applications Before the Court

4. The Plaintiff initially filed the same action in the Magistrate court against the Defendant and withdrew subsequently for the purpose of filing in the High Court.

5. The High Court action was filed on 1 April 2009 and solicitors for the Defendant filed the acknowledgement of service on 22 April 2009.

6. The Defendant failed to file his Statement of Defense on or about 22 July 2009 and the Plaintiff filed praecipe for search for Statement of Defense and judgment by default was entered as there was no Statement of Defense filed.

7. Judgment by default was served on the solicitor for the Defendant on 24 July 2009.

8. On 2 February 2010, the Plaintiff filed summons for assessment of damages, as there was no application to set aside the default judgment since 24 July 2009 and on the Defendant's solicitors accepted the summons on 4 February 2010.

9. The summons for assessment of damages was mentioned before Wati J on 15 February 2010 and the counsel for the Defendant was present and matter was adjourned to 20 April 2010 for hearing.

10. On 20 April 2010 summons for assessment of damages proceeded to hearing in the absence of the Defendant or his counsel and the judgment was delivered on 6 June 2011.

11. On 19 August 2011 writ of fieri facias was filed against the Defendant and proceeded to execute the writ.

12. The Defendant thereafter filed the present application in court supported by an affidavit sworn 28 September 2011.

13. The Plaintiff filed summons on 30 January 2012 for an order that the summons filed by the Defendant on 28 September 2011 to set aside and stay of enforcement of proceedings be struck out, supported by an affidavit of Richard Broadbridge sworn on 28 November 2011.

The Determination

14. An application to set aside the judgment entered after trial has been considered in **Shocked and Another v Goldschmidt & Other [1998 1 All E.R 372]** where Leggart LJ held:

> *"The cases about setting aside judgments fall into two main categories:*
>
> *(a) Those in which judgment is given in default of appearance or pleadings or discovery,*
> *(b) Those in which judgment is given after a trial, albeit in the absence of the party who later applies to set aside.*
>
> *Different considerations apply to these two categories because in the second, unless deprived of the opportunity by mistake or accident or without fault on his part, the absent party has deliberately elected not to appear, and adjudication on the merits has thereupon followed."*

15. Leggatt LJ further held:

> *"These authorities about setting aside judgment after a trial indicate that each case depends on its own facts and that the weight to be accorded to the relevant or general indications as Lord Wright might have called them. (1) Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision. (2) Where judgment has been given after a trial*

it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a rehearing. (3) Where the setting aside of judgment would entail a complete retrial on matters of fact which have already been investigated by the court the application will not be granted unless there are very strong reasons for doing so. (4) The court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success. (5) Delay in applying to set aside is relevant, particularly if during the period of delay the successful party has acted on the judgment, or third parties have acquired rights by reference to it. (6) In considering justice between parties, the conduct of the person applying to set aside the judgment has to be considered: where he has failed to comply with orders of the court, the court will be less ready to exercise its discretion in this favour. (7) A material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences. (8) There is a public interest in there being an end to litigation and is not having the time of the court occupied by two trials, particularly if neither is short."

16. The Defendant in his affidavit deposed:

i]. "*that in or about February 2008 I received a "Demand Notice-Monies Owed to Skylite" from the Plaintiff's solicitor. I gave instructions to my lawyers to attend to this matter. In or about May 2008, my lawyers attended to court when called.*

ii]. *that I was assured by the relevant counsel that he would handle the matter.*

iii]. *that I was not aware or made aware of any progress of the case until I was served with an "ORDER" and 'WRIT OF FIERI FACIAS" that has been made against me. I was not advised nor informed by my lawyers of this.*

I am verily informed that there was no appearance on my behalf on 6 June 2011, even after I had given instructions. I was never advised of any hearing of this matter.

iv]. *that the "Writ of Fieri Facias" was issued on the 9 September 2011 by the High Court of Fiji, Suva."*

17. It is clear from the affidavit of the Defendant that the meritorious defense advanced by him to set aside the judgment mainly focused on the issue of jurisdiction and that there is no enforceable contract.

18. Having considered the material submitted by the Plaintiff, it is evidently clear that both parties are residents of Fiji and entered in to a contract in Fiji. The Plaintiff filed the instant action before the court for damages for breach of contract.

19. In my view, the Plaintiff has submitted the necessary documents to satisfy court that the Plaintiff has a cause of action against the Defendant in the jurisdiction of Fiji.

20. It is further observed that the court in summary judgment in assessment of damages too has held that there is enforceable contract.

21. It appears from the affidavit of the Defendant that from May 2009 to 9 September 2011, he has failed to make enquiries to ascertain to the progress of his case from solicitors.

22. The explanation for the delay was that he has handed over the case to solicitors to defend and he was assured by the counsel that he would handle the matter.

23. It is to be noted that the Defendant has subsequently retained a different solicitor the purpose of present application.

24. In the case of **B.L Naidu & Sons v the Labour Officer FJHC 354** HBM 15 of 2005, Finnigan J held:

> *"the application for leave to appeal has two major aspects. First it does not disclose any grounds on which it might succeed on the appeal. Second it does not disclose any grounds on which it might succeed on the appeal. Second it does not disclose any substantial reasons to explain either its non appearance in the Magistrate's Court or its delay in bringing this application for leave. The Applicant should be in no doubt that the party involved in these proceedings is itself and not its lawyers. It cannot dispose of its obligation and responsibility by accepting service, handing the documents to its lawyers and then taking no further interest in the proceedings."*

25. It is further noted from the correspondences exchanged between the Plaintiff and the Defendant that there is an admission of liability and the quantum of damages was in dispute. A party who has admitted the breach is now taking up the objection to the jurisdiction in his affidavit to set aside a judgment as a meritorious defense.

26. This court is not inclined, having considered material submitted to court on the issue of jurisdiction, that the defense is meritorious defense and accept the explanation for the delay.

Orders

For the aforesaid reasons after considering the submissions advanced by counsel and the principles governing an application of this nature, in the exercise of my discretion, I do not consider this to be a proper case to grant the stay of execution of the summary judgment and set aside the default judgment.

The application for stay of execution of the summary judgment and set aside the default judgment is struck out with cost summarily assessed in a sum of $1,000.00 payable by the Defendant to the Plaintiff within 14 days of this judgment.

Susantha N. Balapatabendi
JUDGE