

IN THE HIGH COURT OF FIJI
AT LAUTOKA
WESTERN DIVISION

CIVIL JURISDICTION

Civil Action No. HBC 211 OF 2011

BETWEEN : **WARICK LEE MCCALLION** of FASA Subdivision, Nadi,
 Director.
1st Plaintiff

PACIFIC VENDING LIMITED a limited liability company
 having its registered office at Lautoka
2nd Plaintiff

AND : **GLENN CLIFFORD SMITH** of Waqavuka Road, Namaka,
 Nadi, Director
1st Defendant

BIMAL PRASAD of Pacific Embroidery Limited, Martintar, Nadi
2nd Defendants

PACIFIC EMBROIDERY LIMITED a limited liability
 company having its registered office at Lautoka, Nadi
3rd Defendant

Ms LOUISE JOSEPH (other particulars now known to the
 plaintiffs) of Namaka, Nadi
4th Defendant

RASER CHARTERS LIMITED a limited liability Company
 having its registered office at Jay Lal & Co 21, Tua Street, Marine
 Drive, Lautoka
5th Defendant

FINEST LIQOUR FIJI LIMITED a limited liability
 company having its registered office at Jay La l & Co, 21 Tui
 Street, Marine Drive, Lautoka
6th Defendant

PLAY PACIFIC FIJI LIMITED a limited liability company
 having its registered office at Jay Lal & Co 21 Tui Street
 Marine Drive, Lautoka
7th Defendant

WESTPAC BANKING CORPORATION LIMITED a
 financial institution having its headquarters in Suva
8th Defendant

Messrs Babu Singh & Associates for the Plaintiffs

Messrs Young & Associates for the Defendants

Date of Order : 14 October 2013

ORDER

INTRODUCTION

[1] This is an application filed by the 5th -7th Defendants (the defendants) to set aside the default judgment entered on 27 February 2013 against them for failure to file and serve defence. The application has been made pursuant to O. 19 r. 9 of the High Court Rules 1988 (HCR). In conjunction with this application the Defendants also filed affidavit of Glenn Clifford Smith (1st Defendant) in support.

[2] Initially, the Plaintiffs had brought this action only against 1st – 4th defendants by Writ of Summons filed on 26 December 2011. Thereafter, on 4 January 2013 the Plaintiffs filed an Amended Statement of Claim after obtaining leave on an ex parte application whereby the 4th – 8th Defendants had been added to the proceedings as Defendants. 1st – 4th Defendants had filed their defence on 20th February 2013. However, the Defendants did not file their defence which resulted in default judgment being entered against them.

[3] On 28 May 2013 the Plaintiffs filed an affidavit in opposition to this application.

FACTUAL BACKGROUND

[4] The 1st plaintiff and the 1st defendant are directors of the 2nd plaintiff, Pacific Vending Ltd (PVL). PVL was operating from an extension of the 3rd defendant's premises at Namaka subdivision, Nadi. The 1st, 2nd and 4th defendants are either the directors or officers of the 3rd, 5th to 7th defendants. PVL moved its business operation from the 3rd defendants premises sometimes late in 2010. The plaintiff then instituted the present proceedings against all defendants claiming fraud and negligence. It is alleged by the 1st Plaintiff that the 2nd and 4th Defendants were signing the PVL cheque book without his knowledge and approval in 2010.

ISSUE FOR DETERMINATION

[5] The issue for determination before the Court is whether or not to set aside the default judgment obtained against the defendants and sealed on 27th February 2013 and the Court proceed to assessment of damages.

THE LAW

[6] O.19 r.9, HCR states that:

“The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order”.

[7] In **Suva City Council v MeliTabu** ABU 55 of 2003S, the Court of Appeal, referring to **PankajBamola& Another v Moran Ali** FCA 59/90 stated that:

“However, in order for the court to properly exercise the discretion whether or not to set aside a regularly obtained default judgment, it has been consistently held that certain basic preconditions must be fulfilled by the party making the application.

These are:-

- (i) Reasons why judgment was allowed to be entered by default.*
- (ii) Application must be made promptly and without delay*
- (iii) An affidavit deposing to facts that show that the defendant has a defence on the merits”*

[8] In **Alpine Bulk Transport Co. Inc v Saudi Eagle Shipping Co., the Saudi Eagle**[1986] 2 Lloyd’s Resp. 221it was held that:

- “(a) It is not sufficient to show a merely “arguable” defence that would justify leave to defend under Order 14; it must both have “ a real prospect of success: and “carry some degree of conviction”. Thus the Court must form a provisional view of the probably outcome of the action.*
- (b) If the proceedings are deliberately ignored, this conduct, although not amounting to an estoppels at law, must be considered “injustice” before exercising the court’s discretion to set aside.” (Emphasis added).*

The Court then stated that:

... we subscribe to the White Book's preferred view that "unless potentially credible affidavit evidence demonstrates a real likelihood that a defendant will succeed on fact no "real prospect of success" is shown and the relief should be refused".

ANALYSIS AND DECISION

(a) Reason for default judgment:

[9] The default judgment was entered against the defendant for they failed to file their Statement of Defence within the prescribed time in compliance with O. 18 r.2, HCR. Pursuant to this rule they should have filed their defence within 14 days of service of writ of summons. O.18 r.2.- (1) states that a defendant who gives notice of intention to defend an action, must unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of 14 days after the time limited for acknowledging service of the writ or after statement of claim is served on him, whichever is the later.

[10] The plaintiff has obtained the default judgment against the defendants for failure on the part of the defendants to serve their defence within the time limited for such service. The defendants had failed to comply with a mandatory provision of the HCR, i.e. O.18 r.2 (1). So, the default judgment has been regularly entered against the defendants. There was no argument before me that the default judgment was obtained irregularly against the defendants. Since the default judgment has been entered regularly the Court in the exercise of its discretion may set aside the default judgment if it thinks just, pursuant of O.18 r.9, HCR.

[11] The Defendants explain the circumstances which led to the default judgment against them. They say that their counsel overlooked the fact that a defence was required to be filed as there was a defence filed on 20 February 2013 albeit, in respect of 1st – 4th Defendants only. The Defendants were added to the proceedings subsequently after the 1st – 4th Defendants had already filed their defence. It is true that the Defendants would have overlooked the need to file a defence for them as other initial 1st – 4th Defendants had already filed their defence. The Defendants had been added to these proceedings after more than a year since the filing of the original writ. I am inclined to accept this explanation as reasonable one.

(b) Was there delay in making application?

[12] The impugned default judgment had been entered on 27 February 2013. The defendants had filed their application to set aside the default judgment on 2 April 2013. The application has been made a month and two days after the default judgment was entered against them. I heard no argument from the plaintiff that the defendants did not make their application to set aside promptly and without delay. In any event a month and two days cannot be said inexcusable and inordinate delay. Delay was not an issue in these proceedings.

(c) Proposed defence

[13] I must decide in these proceedings that whether the Defendants' proposed defence has a real prospect of success and carry some degree of conviction.

[14] The Defendants proposed defence is as follows:

(i) That the 1st Defendant in his capacity as Chairman of the 2nd Plaintiff in about early 2010 appointed the 2nd and 4th Defendants as signatories to the PVL cheque account. This was done as a result of the fact that the 1st Plaintiff was away from Fiji from about March to July 2010. In addition, to ensure the continued operations for the PVL during the 1st Plaintiff's absence from Fiji, the 4th Defendant was appointed as a director of the PVL by the 1st Defendant in his capacity as Managing Director of the PVL (see paragraphs 23 – 25 of the 1st Defendant's affidavit in support).

(ii) That the 1st Plaintiff acquiesced to the 1st Defendant's decision when he accepted several cheque payments that were signed and authorized by the 2nd and 4th Defendants. And that the 1st Plaintiff in his affidavit in opposition accepts that these payments were made on his behalf which he accepted and raised no issues with.

[15] The Plaintiffs' action arises out of two causes of action based on negligence and/or fraud allegedly occurred in 2010 whereupon the Plaintiffs allege that discrepancies were discovered in the PVL cheque book in that the 2nd and 4th Defendants had signed the cheques without his knowledge and approval.

[16] The Defendants are envisaging to defend the claim of the Plaintiffs on the basis that the 1st Defendant in his capacity as Chairman of the PVL made the necessary arrangement by appointing the 2nd and 4th Defendants as signatories to the PVL's cheque account, for the 1st Plaintiff was away overseas. The Defendants further say this was done to ensure the continued operations of

the PVL during the 1st Plaintiff's absence from Fiji. It is true that the Plaintiffs had formulated the causes of action on the basis of negligence and/or fraud that is arising out of the alleged cheque payment that had happened in 2010, i. e. after the appointment of the 2nd and 4th Defendants as signatories of the PVL's cheque account.

[17] It has been also the Defendants' proposed defence that the 1st Plaintiff acquiesced to the 1st Defendant's decision by accepting several cheque payments that were signed and authorized by the 2nd and 4th Defendants [see para 28 and cheques exhibited to the affidavit in support as GCS11A- J]. Significantly, the 1st Plaintiff in his affidavit in opposition accepts and says that these payments were made on his behalf and raised no issues with it.

[18] Had the 1st Defendant as Managing Director of the PVL necessary power and authority to appoint 2nd and 4th Defendants as signatories to PVL's cheque account in the absence of the 1st Plaintiff? Is it possible for the 1st Defendant to make such appointment without resolution? One can get answers to these questions from the Articles of Association of the PVL. Articles of Association of a company regulate the internal management and operation of the company. Mr Maopa counsel for the Plaintiff argued that the authority of the directors or the chairman of the company comes in general meeting of the directors. They discuss matters involving the company, vote and record minutes of the meeting. Counsel for the Plaintiffs further argued that the meeting or resolution of directors authorize the activities and transactions of the company. The absence directors' meeting to approve and authorize the action taken by the Defendants leads to abuse and fraud. Nonetheless, Mr Maopa's argument does not suggest under which Article a resolution was necessary for such appointment. The arguments advanced by the counsel for the Plaintiffs appear to be general argument. He did not refer to any particular provisions of the Articles of Association under which a resolution was required before appointing the 2nd and 4th Defendant to sign the PVL's cheque on behalf of the 1st Plaintiff in his absence.

[19] Whether the 1st Defendant had necessary authority and power to appoint the 2nd and 4th Defendants as the signatories for the PVL's cheque account in the absence of the 1st Plaintiff and whether the 1st Plaintiff acquiesced to the 1st Defendant's decision by accepting several cheque payments that were signed and authorized by the 2nd and 4th Defendants raise arguable issues. But it is not sufficient to show merely arguable defence to set aside the default judgment entered against the Defendant. As stated in Alpine's case (supra) the Defendants must show that their defence has both *"a real prospect of success: and "carry some degree of conviction"*.

[20] The Defendants state in the affidavit in support that over the years, the 5th – 7th Defendants have also provided financial assistance to the PVL to assist its operation (see paragraphs 14 – 17 of the affidavit in support).

[21] The 1st Defendant deposes in his affidavit in support that how he brought the intercompany debt from \$218,963.00 to \$91,905.00 by his action in his capacity as Managing Director and by authorizing the making of the payments for the reduction of the intercompany debt.

[22] The proposed defence of the Defendants is reflected in the affidavit in support sworn and filed by the 1st Defendant. In addition, the draft defence is also exhibited to the affidavit.

(d) Prejudice to Plaintiff

[23] The counsel for the Plaintiff submitted that if the default judgment is vacated, the Plaintiff would be prejudiced as it would invariably delay the recovery of the amount stated in the claim against the Defendants and initial process. He further submitted that there is a summons for assessment of damages pending to be dealt with by the court. I disagree with this argument, because there is nothing to suggest that the Plaintiff will suffer irreparable injury if the default judgment is set aside. Prejudice to the Plaintiff, if any could be compensated in terms of costs and I will do that in these proceedings.

[23] In conclusion, I conclude that the Defendants had satisfied all requirements, as mentioned above, for setting aside the default judgment in that they had acted promptly and without delay on discovering the default judgment had been entered against them, they had a good reason for not filing their defence in time. Moreover, I am of opinion that the Defendants' proposed defence discloses an arguable defence. Further, I also had formed a provisional view that their defence has both a real prospect of success: and carry some degree of conviction. I therefore think that it is just to set aside the default judgment entered and sealed on 27 February 2013. However, the Defendant must pay the sum of \$850.00, which is summarily assessed, to the Plaintiffs before filing their Statement of Defence.

Orders:

- (i) The default judgment entered on 27 February 2013 against the Defendants is set aside;
- (ii) The Defendant to file and serve their Statement of Defence within 14 days from today;
- (iii) The Defendants to pay costs to the Plaintiffs in the sum of \$850.00 before filing their Statement of Claim;

- (iv) The matter to take its normal course; and
- (v) The matter has been adjourned to 8 November 2013 for mention only.

M H Mohamed Ajmeer
Acting Master of the High Court

At Lautoka