

IN THE HIGH COURT OF THE REPUBLIC OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 08 of 2013

BETWEEN : **HIROKAZA TAKAYANAGI** also known as **TAKAYANAGI HIROKAZU** formerly of Martintar, Nadi presently Ichihara – Shi, Chiba, Japan, Businessman
Plaintiff

AND : **SSS INTERNATIONAL HOTEL (FIJI) LIMITED** a limited liability company having its registered office at 70 Cumming Street, 3rd Floor, 2nd Suite, Brijlal Building, Suva
Defendant

Messrs Patel & Sharma Barristers and Solicitors for the Plaintiff

Messrs Vuataki Law Barristers and Solicitors for the Defendant

Date of Judgment: 21 October 2013

J U D G M E N T

1. There are two applications before me. One has been filed by the Plaintiff and the other by the Defendant. They are;
 - a. Summons for Summary Judgment filed by the Plaintiff dated the 1 May 2013 seeking the following orders;
 - (i) That judgment in the sum of \$260,000.00 and the sum of JYP 196,727,000 or in the alternative judgment to the Plaintiff in the sum of \$178,748.00;
 - (ii) Interest on any monetary award;

- (iii) Costs of this application on solicitor/client indemnity basis;
 - (iv) Any further or other orders of this Honourable Court.
- b. Summons for Amendment of the Statement of Defence filed by the Defendant dated the 17 June 2013 seeking the following orders;
- (i) That the Plaintiff's summons dated 1st day of May 2013 be dismissed with costs;
 - (ii) That the Defendant be granted leave to amend Defence;
 - (iii) That the Plaintiff's claim be struck out;
 - (iv) That cost of this application be cost in the cause.
2. The Defendant's summons seeking leave to amend the defence also has a prayer that the Plaintiff's claim be struck out. However, that application was not pursued and pressed at the hearing. I therefore struck out that application as abandoned.
3. In support of the summons for the summary judgment the Plaintiff has filed affidavit of Tomoyuki Takayanagi along with exhibits "A – D".
4. The Defendant has filed affidavit of RavikashNand in reply to the Plaintiff's summons for summary judgment and in support of application to amend defence and application to strike out claim along with annexures "RN1 – RN15".

Background

5. The claim by the Plaintiff is based on a sale and purchase agreement (the agreement) for the purchase by the Defendant of the Plaintiff's land comprised in Certificate of Title Number 24749 (the land). They agreed on 3 March 2007 that the sale was for the sum of \$480,000.00. They also agreed that a portion of the sale proceeds is yet to be paid to the Plaintiff by the Defendant in respect of the agreement. The Defendant paid only \$220,000 and the balance sum of \$260,000 was to be paid. Subsequently the Defendant refused to pay the balance as agreed though demanded thereto. The land has already been transferred to the Defendant on the 17 September 2007 without the payment of the full consideration sum. The Plaintiff through the writ of summons

claims special damages in the sum of \$260,000.0 and further sum of JPY 196,727,000, general damages, interest and cost against the Defendant.

6. The Defendant filed statement of defence on 14 February 2013 and stated that paragraph 6 of the claim (a balance sum \$260,000.00 is due to be paid on account of the agreement) is denied as the Defendant has **paid a total sum of \$321,251.90 leaving a balance of \$178,748.10.** The Defendant further stated that paragraph 7 is denied as the Defendant had informed Plaintiff that it will still abide by their agreed instalment payment method for payment of the balance of \$ 178,748.10 and the Plaintiff is estopped from renegeing on his agreement to accept instalment payments on balance. The Defendant specifically stated in its statement of defence that it is denied that \$260,000.00 is owed as **only \$178,748.10 is owed.** (Vide paragraphs 6, 7 & 8 of the statement of defence).
7. The Plaintiff's summons for summary judgment has been filed following the Defendant's clear admission that they owe a balance sum of \$178, 748.10 only to the Plaintiff as per agreement and prepared to pay that amount on instalment basis.

The Law

8. The Plaintiff may, under HCR O.14 r.1, apply for summary judgment against the Defendant on the ground that the Defendant has no defence to a claim. HCR O.14 deals with summary judgment. O.14 r.1 provides that:

*“1.-(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, **on the ground that that defendant has no defence to a claim** included in the writ, or particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the court for judgment against that defendant.*

(2) ...

(3) ... (Emphasis added).

9. Pursuant to HCR O. 14 r.3 the Plaintiff may obtain judgment against the Defendant on the claim or part as may be just. O.14 r.3 states that:

“3.-(1) Unless on the hearing of an application under rule 1, either the Court dismisses the application or the defendant satisfies the Court with respect to the claim or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or there ought for some other reasons to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claim”.

10. Honourable Justice Gate (as then he was) in **ANZ Banking Group Ltd v Buckley** [2004] HBC 272 of 2000 under paragraph 11 has this to say:

“[11] But sometimes the court needs something more than mere assertion. It requires a sufficiency of information or more detail in order to find that there is a genuine and substantial issue to be heard.”

Discussion and decision

(a) Application to amend statement of defence

11. After the Plaintiff’s application for summary judgment was filed, the Defendant has filed a summons seeking to amend the statement of defence. A proposed amendment has been exhibited to the summons that seeks leave of the Court to amend the defence. It is sensible to deal with the application to amend the defence before I deal with the application summary judgment.
12. The application seeking leave of the Court to amend the defence is made under HCR O.20 r.5 (1), which provides that:

*“5.-(1) Subject to Order 15, rule 6, 8 and 9 and the following provisions of this rule, the Court **may at any stage of the***

proceedings allow the plaintiff to amend his writ, or **any party to amend his pleading**, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct” (Emphasis added).

13. A party may, without the leave of the Court, amend any pleading of his once at any time before the pleadings are deemed to be closed and, where he does so, he must serve the amended pleading on the opposite party (HCR O.20 r.3).
14. The Defendant’s application to amend the defence is made after the Plaintiff had filed his reply to the statement of defence. The application to amend the defence is therefore made after close of the pleadings. The Defendant may amend its defence with leave of the Court.
15. The Plaintiff does not seriously oppose the application made by the Defendant to amend its defence.
16. The test to be applied as stated in the case of **Elders Pastoral Ltd v. Marr** [1987] 2 PRNZ 383 (C.A.) is whether the amendment is necessary in order to determine the real controversy between the parties and does not result in injustice to the other parties.
17. There is nothing before me to show that the Plaintiff would be prejudiced if the proposed defence of the Defendant were allowed. I therefore would grant leave to the Defendant to amend its statement of claim as per proposed statement of defence exercising the discretion of the Court to grant leave to amend any pleading at any stage of the proceedings in favour of the Defendant.

(b) Application for summary judgment

18. The Plaintiff has made his application seeking summary judgment in the sum of \$260,000.00 and in the sum of JY196, 727,000.00 or in the alternative the sum of \$178,748.00. The application for summary judgment has been made on the ground that that defendant has no defence to a claim *included in the writ*. In this case the

Plaintiff has applied for a summary judgment for a particular part of his claim. The Plaintiff can make such application pursuant to HCR O.14 r.1.

19. Upon hearing an application for summary judgment, the Court may give judgment for the Plaintiff against the Defendant on that claim or part as the case may be unless the Defendant satisfies the Court with respect to the claim or part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part (HCR O.14.r.3).
20. According to O.14 r.3 it is clear the Defendant has the burden of satisfying the Court that there is an issue or question in dispute which ought to be tried.
21. The issue to be decided by the Court in these proceeding is that whether the Defendant has an issue or question in dispute which ought to be tried. In other word the Court must determine that whether the defence disclose an issue or question in dispute which ought to be tried. I must decide this issue on the assumption that the Defendant had filed its proposed amended statement of defence.
22. The application for summary judgment is filed following the admission by the Defendant in its statement of defence filed on 14 February 2013 wherein the Defendant in no uncertain term admitted that **only \$178, 748.10 is due**. Following this admission the Plaintiff filed the application for summary judgment for that amount being part of the claim. The Plaintiff claimed the sum of \$260,000.00 under the agreement. The Defendant in its statement of defence filed on 14 February 2013 stated that the Defendant has paid a total sum of \$321,251.90, giving breakdown of six payments, leaving a balance of \$178,748.10.
23. Suddenly, the Defendant filed an application seeking leave of the Court to amend the statement of defence. In the proposed amended statement of defence the Defendant states that they have paid all the amount payable under the agreement by making 13 instalment payments **leaving a balance of \$18,750.00** which the Defendant has offered to pay. The standing taken earlier in the original statement of defence that the Defendant has to pay only a balance of \$178,000.10 has been completely changed in

the proposed amended statement of defence therein the Defendant states that they have to pay only goodwill payment of \$18,750.00.

24. In the original statement of defence the Defendant stated they had made 6 instalment payments totalling \$321,251.90 whereas in the proposed amended statement of defence it is stated that they had made some 14 instalment payment totalling \$481,250.00 making balance remaining nil.
25. The Defendant has filed two affidavits of RavikashNand, the Hotel Manager of the Defendant company in support. In that affidavit he states about some cheque payments. He states that two cheque payments \$40,000.00 each were made on 12 February 2013 (RN 11 & RN12). This alleged cheque payments were made on 12 February 2013 just two days before the filing of original statement of defence on 14 February 2013. If these payments were in fact made to the Plaintiff on the same day why two cheques were drawn. These cheques appear to be cash cheques. There is no proof that these cheques were drawn in favour of the Plaintiff. Further, the Defendant had every opportunity to mention these cheque payments in the original statement of defence as payments alleged to have been made prior to the filing of the original statement of defence.
26. To my astonishment, RavikashNand in his affidavit further states that another two cheque payment \$40,000.00 each were made on 12 March 2013. Again why two cheque payments on the same day if it had been made to the Plaintiff. Apparently, these alleged two cheque payments have been made after filing the statement of defence. Why all of a sudden these payments were made when the matter is pending in Court? In fact, if the Defendant wanted to make any payments after institution of the action they should have made such payments through Court or through Plaintiff's counsel. The Defendant had failed to do so. In the circumstances I doubt these payments were in fact made to the Plaintiff toward the balance payment that was due under the agreement.
27. The Defendant was not consistence in their defence. The defence that the Defendant had made all the payment, leaving \$18,750.00 is, in my opinion, an after thought defence and it is a mere assertion.

28. The Defendant is required by HCR O.14 r.3 to satisfy the Court that they have an issue or question in dispute which ought to be tried. As stated by Honourable Justice Gate (as then he was) in **ANZ Banking Group Ltd v Buckley** (supra) the Defendant has failed to show that there is a genuine and substantial issue to be heard. The Plaintiff therefore entitled to summary judgment for the sum of \$178,748.00 being the part of his claim.
29. Mr R. Singh counsel for the Plaintiff submitted that the Plaintiff is entitled to interest as any judgment would attract interest. There is no interest rate mentioned in the agreement between the parties hence interest may be awarded at the discretion of the Court. Mr Singh cited the case of **Air Fiji Ltd v Houng Lee** [2005] FJCA 84, where Fiji Court of Appeal held that pre-judgment interest was always in the discretion of the judge, and if awardable on what quantum such interest should be awarded. The Plaintiff seeks pre-judgment interest from 17 September 2007, being the day the transfer for the land was registered in favour of the Defendant at the rate of 6 per cent. However, the demand for balance payment has been made on 12 December 2012 (vide Exhibit "C" annexed to the affidavit of Tomoyuki Takayanagi). Therefore it would be prudent to award interest from that date, i.e. 12 December 2012. Accordingly I award interest at the rate of 6 per cent from 12 December 2012 till the date of payment.
30. The Plaintiff is also entitled to cost of this application. The Plaintiff seeks costs on solicitor/client indemnity basis. But I prefer to order summarily assessed cost in these proceedings and that would do justice to the Plaintiff. I therefore order the Defendant to pay costs of this application in the sum of \$1,650.00 which is summarily assessed. The costs to be paid within 14 days by the Defendant to the Plaintiff.

Conclusion

31. In the circumstances I make the following orders:
- (i) Summary judgment against the Defendant in the sum of \$178,748.00 with costs summarily assessed at \$1,650.00;
 - (ii) The Defendant to pay interest at the rate of 6 per cent per annum from 12 December 2012 till the date of payment in full.

- (iii) Leave is granted to the Defendant to file and serve amended statement of defence within 14 days from today;
- (iv) The Plaintiff to file and serve within 14 days thereafter, if need be, reply to the amended statement of defence.

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M H Mohamed Ajmer
Acting Master

At Lautoka