

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

[CIVIL JURISDICTION]

Civil Action No. HBC 43 of 2010

BETWEEN : **BAS KARAN** son of Krishna of Namadi Heights, Taxi Driver.

Plaintiff

AND : **ABHILESH CHAND** son of Abhay Chand of Sabunawai,
Nadi.

1st Defendant

AND : **TOURIST TRANSPORT FIJI LIMITED** a limited liability
company having its registered office at Nadi, Fiji.

2nd Defendant

AND : **SUREN SINGH** son of Surjan Singh of Korovuto, Nadi,
Supervisor.

3rd Defendant

Messrs Reddy and Nandan, Barristers and Solicitors for the Plaintiff

Messrs A K Lawyers for the 1st Defendant

Date of Order: 22 October 2013

ORDER

Introduction

[1] There are two applications before me.

Firstly, a Notice of Motion dated 27 March 2013 and filed on 11 April 2013 (the motion) by Plaintiff together with an affidavit in support of the motion sworn on 27 March 2013 and seeking the following orders:

1. That the above matter in which the Statement of Claim was taken off the cause list on 9th day of August 2011 with no order as to costs due to inordinate delay be re-instated to the cause list and a fresh mention date be assigned.
 2. That the costs of this application be costs in the cause.
- (a) Secondly, a summons to dismiss for want of prosecution filed on 17 April 2013 by 1st and 2nd Defendants (the summons) together with affidavit Romanu Namawi Vananalagi in support of the summons to dismiss action for want of prosecution whereupon the 1st and 2nd Defendants (the Defendants) seeking an order that the Plaintiff's action and claim against the Defendants be struck out and dismissed for want of prosecution on the ground that the Plaintiff has failed to comply with orders of the Court made on 19th May 2010 and 9th June 2010 and to prosecute the proceedings expeditiously and have abused the process of the Court and/or thereby prejudice to the Defendants and there is a substantial risk of not obtaining a fair trial and that the Plaintiff pay costs of this application.

Background

[2] The Plaintiff filed the action by Writ of Summons filed on 8 March 2010. His claim is for alleged personal injuries he sustained as a result of a motor vehicle accident that occurred on 1 April 2007. The plaintiff seeks to recover general damages for pain and suffering, loss of pre-trial and future damages, interest and indemnity costs. The Defendants filed their Statement of Defence and Counterclaim (by 2nd Defendant) and stated that the accident was caused solely through the negligent driving by the Plaintiff and sought dismissal of his claim and counterclaimed that the Plaintiff to pay special damages in the sum of \$17,942.00, general damages, interest and costs of the action. The Plaintiff did not file reply to the Statement of Defence and Defence to Counterclaim to date.

Plaintiff's submission

[3] It was submitted on behalf of the Plaintiff that the Plaintiff was previously represented by Messrs Haroon Ali Shah of Lautoka who has been disbarred from practice in Fiji. The Matter was taken off the cause list for non appearance of the parties. Upon the appointment of the current Solicitors, counsel for the Plaintiff submits, an application was immediately made for reinstatement but the same was struck out due to some miscommunication with their City Agents. Immediately after the striking out of the previous application, this current application was made. The counsel further submitted that the Plaintiff has a valid and a meritorious claim against the Defendants for negligence.

[4] On the other hand Mr Prakash, counsel for the Defendants submitted the following:

“That the delay is inordinate. We rely on and refer your Lordship to the chronology earlier. The Plaintiff has taken no steps since the Defence was filed on 14th February 2003(sic). The Plaintiff has failed to take the following steps:

- The Plaintiff has defied court orders made on 19th May, 2011 and 9th June 2011.
- The Plaintiff has failed to disclose medical reports and other do essential documents sought by way of discovery.
- The Plaintiff has not filed a summons for directions
- The Plaintiff has not filed Reply to the Statement of Defence
- The Plaintiff has not filed a Defence to Counter Claim
- The Plaintiff has not filed a Notice of Intention to proceed under Order 3 Rule 4
- Otherwise been in continuous and serious defaulters as set out in the Affidavit of Manu”.

[5] The counsel for the Defendants finally submitted that there is no explanation as to why there was no intermittent or intervening activity on the part of the Plaintiff.

The Law

[6] The High Court Rule (**O.25, r.9**) provides that:

(1) If no step has been taken in any cause or matter for six months then any party on application or the Court of its own motion may list the cause or matter for the parties to show cause why it should not be struck out for want of prosecution or as an abuse of the process of the Court.

2) Upon hearing the application the Court may either *dismiss the cause [or] matter on such terms as may be just or deal with the application as if it were a summons for directions.* (Emphasis added).

[7] The Fiji Court of Appeal in Owen Clive Potter v Turtle Airways Limited (CIV Appeal No. 49 of 1992 at p3 &4) explained the meaning of ‘inordinate’ and ‘inexcusable’ delay in prosecuting the claim as follows:

“(Inordinate).....means so long that proper justice may not be able to be done between the parties. When it is analyzed, it seems to mean that the delay has made it more likely than not that the hearing and/or the result will be so unfair vis a vis the Defendant as to indicate that the court was unable to carry out its duty to do justice between the parties”.

...Inexcusable means that there is some blame, some wrongful conduct, some conduct deserving of opprobrium as well as passage of time. It simply allows the judge to put into the scales the Plaintiff’s conduct or reasons for not proceeding, as well as the lapse of time and the prejudice that would result to him from denying him opportunity from pursuing the action or perhaps any action against the defendant”.

[8] In Grovit v Doctor and Others (1997 1 WLR 640 at 641 H.L) it was held in a situation such as the present:

“That for the plaintiff to commence and to continue litigation which he had no intention to bring to a conclusion could amount to an abuse of process; and that, accordingly, once the court was satisfied that the reason for the delay was one which involved an abuse of process in maintaining proceedings when there was no intention of carrying the case to trial it was entitled to dismiss the action”

Dismissal on grounds of abuse of process

[9] Halsbury’s Laws of England 4th Edition Volume 37 para 434 where it has been stated:-

“An abuse of process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or more simply where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for

striking out, the facts may show that it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court”.

The Law and Analysis

[10] This is a second application filed by the Plaintiff on 11 April 2013 for the reinstatement of the action which has been taken off the cause list on 10 August 2011 for want of appearance on the part of the Plaintiff. Previously the Plaintiff had filed his first application for reinstatement on 14 February 2011. That application was struck out by the Court on 4 March 2013 again for want of prosecution. The current motion to reinstate has been filed pursuant to inherent jurisdiction of the Court.

[11] In the meantime, the Defendants had filed their summons to dismiss the action for abuse of process pursuant to HCR O.25 r. 9 on 17 April 2013. The Defendants did not file any affidavit in opposition to the Plaintiff's motion to reinstate. There has been no affidavit of service on the record that the Plaintiff's motion was served on the Defendants. Nonetheless, the Defendants had filed their summons to dismiss. Their summons had been filed on 17 April 2013 some 5 days after the Plaintiff's motion. There has been interrelationship between the two applications. Therefore the Court may consider the Defendants summons to dismiss as response to the Plaintiff's motion to reinstate hence it would be sensible to consider both the application together.

[12] The Plaintiff filed this action in March 2010. His claim was taken off the cause list for non appearance on two consecutive dates on 10 August 2011. His claim is arising out of a motor vehicle accident that happened in April 2007. It is to be noted that he had filed the claim after nearly 3 years since the cause of action accrued. He filed his first application for

reinstatement on 14 February 2013. That application was struck out for non prosecution. Subsequently he filed this second application for reinstatement on 11 April 2013.

[13] In his affidavit in support the Defendant states that he has recently appointed Messrs Reddy & Nandan Lawyers to take over the matter from his previous Solicitor, Mr. Haroon Ali Shah. He further states that due to the neglect, delay and inadvertence on the part of his former Solicitors the matter has been taken off the cause list.

[14] In response to this Mr. Prakash, counsel for the 1st Defendant submitted that the Plaintiff's conduct until now demonstrates that he has no desire to expeditiously proceed with matters. No credible explanation has been given for the delays. Until a credible excuse is made out, the natural inference would be that is inexcusable. His only excuse is to blame it on his former solicitor Mr Shah. He further submitted that this is not any or any sufficient excuse for the inactivity as Mr Shah was struck out as a Solicitor on 22nd June 2012. There is no explanation as to why there was no intermittent or intervening activity on the part of the Plaintiff.

[15] If **no step** has been taken in any cause or matter **for six months** then any party on application or the Court of its own motion may list the cause or matter for the parties to show cause why it should not be **struck out for want of prosecution** or as an abuse of the process of the Court (HCR O.25.9). The writ of summons has been filed on 8 March 2010, albeit the cause of action arose in April 2007. The 2nd Defendant filed his Statement of Claim and Counterclaim on 31 March 2010 while 1st Defendant on 12 April 2010. There is no Statement of Defence filed on behalf of the 3rd Defendant. On 19 May 2011 the Court directed and granted 14 days to the Plaintiff to file and serve reply to defence and defence to counterclaim and the matter was adjourned to 9 May 2011 for mention. On 9 May 2011 there was an application made on behalf of the Plaintiff to file affidavit in reply. Accordingly the Court granted and ordered the Plaintiff to file and serve affidavit in reply within 14 days. The Plaintiff filed only affidavit in reply on 23 June 2011. Apparently, the Plaintiff did not file reply to defence and defence to counterclaim thereby failed to comply with peremptory orders made by the Court. Afterwards, on 10 August 2011 the matter was taken off the cause list for non appearance of the Plaintiff on two consecutive occasions. Then the Plaintiff filed his first application for reinstatement on 14 February 2013. That application was struck out

for non appearance and for want of prosecution. The current application for reinstatement has been filed on 11 April 2013 for the second time.

[16] The Plaintiff has not taken any step in the matter after the 1st Defendant filed his Statement of Defence on 13 March 2010. There has been long gap between period the 1st Defendant's Statement of Claim and the current application for reinstatement filed on 11 April 2013. The Plaintiff has taken over three years to file his reinstatement application. This is too long delay on the part of the Plaintiff.

Blame on former solicitors

[17] Now, the Plaintiff put the blame on his former Solicitors for the delay and inaction in the matter. Is it possible for the Plaintiff to pass the responsibility on his former Solicitors? Mr. Prakash, counsel for the Defendant submitted that Mr Haroon Ali Shah was acting for the Plaintiff and he was disbarred from practice in June 2012. Still, the Plaintiff had ample opportunity to engage another counsel in the matter. But he did not do so.

[18] In **Bank of Scotland v Pereira & Others** [2011] 3 All ER 392, Lord Neuberger MR had this to say:

"I reject the contention that former solicitors were to blame to delay the matter rather than, saying that 'this is a case where the normal rule shall apply that a party has to bear responsibility for delay whether it be caused by him or his solicitors' (Emphasis added).

[20] '**Blame your former solicitor for delay**' perception invented by the Plaintiff cannot be allowed to succeed. If it is allowed, parties may conveniently blame their former solicitors after charging their solicitors purposely. In the current application the Plaintiff is blaming his former solicitors for delay rather than himself. Following the Bank of Scotland case (supra) I reject the Plaintiff's contention that his former solicitors were to blame to delay the matter. I consider the delay was too long for the current application after the matter was taken off the cause list on 10 August 2011. The delay has been inexcusable and inordinate. The delay has not been sufficiently explained. The plaintiff had also failed to comply with peremptory orders or direction made by the Court on 19 May 2011 including automatic directions under HCR O25 r.8 as his claim is based on personal injury.

[21] The Plaintiff has failed to show that he had good reasons for not attending in Court on two consecutive occasions, i.e. on 24 June 2011 & 10 August 2011. He has also failed to explain the delay in pursuing the matter since 12 April 2010, the day the 1st Defendant filed his Statement of Defence. It appears that the Plaintiff had had no intention to bring the matter to a conclusion. This would amount to abuse of process. I therefore dismiss his application for reinstatement of the matter to cause list and dismiss the claim for want of prosecution and abuse of process of the Court with costs summarily assessed at \$1000.00.

Orders:

- (i) The Plaintiff's application for reinstatement of the matter to cause list is dismissed;
- (ii) The Plaintiff's claim is dismissed and struck out for want of prosecution and abuse of process of the Court; and
- (iii) The Plaintiff shall pay costs summarily assessed at \$1000.00 to the Defendant within 14 days.

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M H Mohamed Ajmeer

Acting Master

At Lautoka

