

In the High Court of Fiji at Suva

Civil Jurisdiction

HBC No. 245 of 2013

BETWEEN: Patrick John Jay

Plaintiff

AND: Rajendra Prasad

First Defendant

AND: Credit Corporation Fiji Limited

Second Defendant

Appearances: Mr N.Nawaikula for the plaintiff

Mr K.Jamnadas for the first defendant

Mr Ritesh Naidu for the second defendant

Date of hearing: 3rd April, 2014

JUDGMENT

1. The plaintiff by originating summons has sought the following orders:

- (i) *That the First Defendant with trickery deception fraudulently and deviously sold a Hitachi Excavator Digger registration no. FQ 518 to the Plaintiff for the sum of \$58,000.00 which was Bill of Sale to the Second Defendant.*
- (ii) *That the First Defendant forthwith refunds the Plaintiff the sum of \$58,000.00 being paid for Hitachi Excavator Digger Registration Number FQ 518 when it was Bill of Sales to Second Defendant.*
- (iii) *That the First Defendant pay Plaintiff \$5,495.00 for loss of Business, General and Punitive Damage with costs of searches and Demand Notice.*

2. *The affidavit in support*

The plaintiff, in his affidavit in support, states that by a written agreement of 16th July, 2012, the first defendant, the owner of an earth moving business agreed to sell to the plaintiff, a digger (excavator) for a sum of \$ 58,000. One of the conditions of the sale was that the earnings from the digger was to be paid to the plaintiff. The agreement dated 16th July, 2012, is attached to the affidavit. The plaintiff states that he paid a sum of \$ 58,000 to the first defendant.

The first defendant signed the transfer forms in favour of the plaintiff. He also certified that he sold one of his machines to the plaintiff. When he went to the LTA, he found that the digger was mortgaged to the second defendant. He believes the first defendant “deceitfully” sold the digger. The plaintiff claims he has suffered loss.

3. *The affidavit in opposition of the first defendant*

The first defendant, in his affidavit in opposition, denies that he contracted with the plaintiff for the sale of an excavator. He states that he has never seen the “purported” agreement attached to the plaintiffs’ affidavit. His signature is forged. He lodged a complaint with the Police. The plaintiff did not pay him the sum of \$58,000.00.

The first defendant alleges that the plaintiff stole the first defendant’s LTA “pre-signed papers”. The plaintiff lived in a house adjacent to the first defendant, also belonging to the first defendant .

The first defendant states that he certified that he sold one of his machines to the plaintiff, to assist the plaintiff to get money he owed from his partner in Australia.

The affidavit in opposition continues to state that any contract between the plaintiff and the first defendant is void for illegality, since the plaintiff is a foreign citizen and does not have the required Foreign Investment Certificate to invest in Fiji.

Finally, the first defendant states that he was advised by his solicitors that the action contravenes the High Court rules with regard to the institution of proceedings.

4. *The affidavit in opposition of the second defendant*

The affidavit in answer of the second defendant provides that by a bill of sale registered on 17 April, 2013, the first defendant assigned the digger to the second defendant, by way of security for the payment of his loan. The plaintiff has no cause of action against the second defendant and has wrongly sued the second defendant.

5. *The hearing*

At the commencement of the hearing, I informed Mr Nawaikula, counsel for the plaintiff, that since the facts in this matter are disputed, the action should be continued as a writ under Or 28, r.9.

Mr Jamnadas, counsel for the first defendant and Mr Naidu, counsel for the second defendant moved for costs. Mr Jamnadas pointed out that the affidavit in opposition of

the second defendant had put the plaintiff on notice that he had adopted the incorrect procedure.

Mr Nawaikula declined to pay costs. He moved to call the plaintiff to testify. Mr Naidu objected to the application, as he quite correctly pointed out that prior notice of this course of action had not been given to the defence. I upheld the objection.

6. *The determination*

- 6.1 The starting point of this dispute is a written agreement dated 16th July, 2012, written in manuscript, whereby the first defendant agreed to sell a digger to the plaintiff for \$58,000. The plaintiff's case is that he paid \$58,000, but the first defendant refused to hand over the digger to him. He found that a bill of sale was registered in favour of the second defendant. The plaintiff alleges that the first defendant deceived him to pay \$58,000.
- 6.2 The first defendant, in his affidavit in opposition, contends that the contract relied on by the plaintiff is a forgery. He alleges that his LTA transfer form (signed by him in blank) was stolen by the plaintiff, who then, fraudulently transferred the property to himself.
- 6.3 Mr Nawaikula submitted that the "*critical facts are not disputed*", as stated in his written submissions filed in Court, at the hearing. The signature of the first defendant in the agreement to sell the digger and the affidavit in opposition was identical. Next, he referred to the copy of the agreement of 16th July, 2012, and the plaintiff's bank statement, as attached to the plaintiff's affidavit in reply filed with his application for interim relief. Mr Nawaikula submitted that the endorsements made by the first defendant on the agreement confirm the several installments paid by the plaintiff, and correspond with the debit entries in the plaintiff's statement of account at Westpac.
- 6.4 Mr Jamnadas in riposte submitted that the plaintiff's case is substantially disputed. The agreement attached to the affidavit is denied. The first defendant alleges that his signature has been forged on the agreement. Mr Jamnadas submitted further that the first defendant's signatures (in the copy of the agreement filed with the plaintiff's affidavit in reply), of payments received are not the same. He points out to a host of other disputed matters.

6.5 Mr Naidu, counsel for the second defendant, begged the question why the second defendant is being sued. The second defendant has a registered bill of sale over the digger.

6.6 Be that as it may, I find that the alleged forgery is under investigation by the Police, as stated in a letter of 26th August, 2013, from the Nausori Police to the first defendant, as attached to the first defendant's affidavit in opposition.

6.7 It is axiomatic that the plaintiff's case presents serious allegations of fraud and deceit. The fact that the first defendant contends that the pivotal contract relied on by the plaintiff is a forgery and his transfer documents were stolen underscores that the entire case for the plaintiff is disputed.

6.8 At the commencement of the hearing, I gave Mr Nawaikula opportunity "to put his house in order" to quote Thompson J in *Brij Ram v Michael Ban Deo*, (ABU 0049) when dealing with this point, and continue his case as a writ. But he proceeded to present his case, as presently constituted.

6.9 In my view, the plaintiff's case simply cannot proceed by way of originating summons.

6.10 I would cite an observation of Ashton-Lewis J. in *Sea Island Paper & Stationery Limited v Dominion Insurance Limited*, (Civil Action No. 0028 of 1994, pg 8 – 9) as referred to by Mr Naidu :

It is trite law and practice that under general principles matters which do not involve disputes as to facts but only questions of law and construction of acts, etc, usually proceed by way of Originating Summons. Any matter which involves a dispute as to facts, and which will require oral examination of witnesses should be proceeded with by way of Writ of Summons with full pleadings. This is so in order that the Court may adjudicate on facts which are in dispute between the parties, and they apply its findings thereon to the issues which are joined between them in the dispute. In a writ action, findings of facts are an important and vital step in adjudicating on, and reaching a decision with regard to the issues which are in dispute between the parties, and they applying the relevant law after having made those findings. In an Originating Summons matter, no question of fact is usually joined in issue between the parties, and thus no findings in that regard are required in order to adjudicate on the issues which are before the court. (emphasis added)

6.11 In my judgment, the plaintiff's case fails.

6.12 It follows that the interim injunction granted in this case cannot stand. As stated in *Mataqali Namatua v Native Land and Fisheries Commission and Others*, (Civil Appeal No. ABU 0020 of 2004) :- “[14]

We observe that an originating summons is not the proper procedural vehicle for the obtaining of an injunction. An originating summons is usually for the determination of a legal issue without contested evidence. An injunction should be sought by means of a statement of claim seeking injunctive relief and damages accompanied by an interlocutory application and affidavits in support.

6.13 I discharge the interim injunction granted on granted on 7th November, 2013.

7. Orders

I make order as follows:

- (a) the plaintiff's action is dismissed.
- (b) The interim injunction granted on 7th November, 2013, is discharged.
- (c) The plaintiff shall pay the first and second defendants a sum of \$ 3000 as costs summarily assessed.

20th November, 2014



A.L.B. Brito-Mutunayagam

Judge