

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 110 of 2014

BETWEEN : MOBILE DISTRIBUTORS (FIJI) LIMITED trading as City Cars & Equipment a limited company having its registered office at 384 Grantham Road, Suva in the Republic of Fiji.

PLAINTIFF

AND : MODERN INVESTMENT SERVICES LIMITED a limited liability company having its registered office at Lot 9, 4 Miles, Kings Road, Nasinu in the Republic of Fiji.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

**COUNSELS: Mr. Viren Kapadia for the Plaintiff.
Ms. Shoma Devan for the Defendant.**

Date of Hearing: 16th February, 2015

Date of Ruling: 31st March, 2015

JUDGMENT

BACKGROUND

1. The Plaintiff filed a Writ of Summons against the Defendant on 16th April, 2014 claiming a sum of \$135,000 with 10% interest for a CATERPILLAR DIGGER sold to the Defendant in October, 2011 on an as is where is basis.
2. He further stated that the Defendant failed and or neglected to make the payment despite several reminders by the Plaintiff.

3. The Writ of Summons was served onto the Defendant on 17th April, 2014 and an acknowledgment of service was filed on 20th April, 2014 couple with a Statement of Defence on 01st May, 2014.
4. The Defendant stated in his Defence that the said Digger was not fit for its purpose and as such no agreement was reached to purchase the said Digger from the Plaintiff. Further, the Defendant denies each and every allegations of fact contained in the Statement of Claim as if the same were set forth seriatim and specifically traversed.
5. The Plaintiff filed a Reply to Defence on 13th May, 2014 and sought for orders to dismiss the Defendant's Statement of Defence with costs and Judgment be entered for the Plaintiff in the sum of \$112,500 plus interest, damages and costs.
6. On 10th September, 2014, the Plaintiff filed a Summons for summary judgment together with an affidavit in support of Uday Raj Sen.
7. The Defendant filed a Summons on 05th December, 2014 and sought for the courts leave and orders for an extension of time to file an affidavit in reply to the Affidavit in Support of Uday Raj Sen filed on 10th September, 2014; with costs in the cause.
8. The application was made with an Affidavit in Support of Anand Kumar sworn on 05th December, 2014.
9. The Plaintiff did not have any objections to this application being granted and sought for 7 days' time to file and serve any reply. This court made the orders on 16th February, 2015,
10. The Defendant filed his Affidavit In Reply on 09th February, 2015 sworn by Anand Kumar,
11. Both Counsel representing the parties to the proceedings filed in written submissions with relevant case authorities and argued the application on 16th February, 2015.

PLAINTIFFS CASE

12. The Plaintiff filed a Summons for summary judgment against the Defendant on 10th September, 2014 wherein he sought for the following orders-
 - (i) That Summary Judgment be entered against the Defendant in the sum of \$112,500;

- (ii) Together with 10% interest per annum from 24th October, 2011 until full payment; and
 - (iii) The costs of this action.
13. The application was supported with an Affidavit of Uday Raj Sen sworn on 10th September, 2014.
14. The Plaintiffs application was filed pursuant to *Order 14 Rule 1 of the High Court Rules, 1988* and the *Inherent powers of this court*.

DEFENDANTS CASE

15. The Defendant filed his Affidavit in Reply to the summary judgment application on 09th February, 2015 and stated as follows-
- (i) That the Defendant has a valid and meritorious Defence to the Plaintiff's claim and the case should rightly be properly tried by the High court.
 - (ii) That the Plaintiff's application be dismissed with costs to the Defendant.

ISSUES

16. The issues that this court needs to determine are as follows-
- (a) Whether summary judgment is available to the Plaintiff as to the nature of his claim in terms of Order 14 Rule 1 of the High Court Rules 1988?
 - (b) Whether an order be made for Summary Judgment against the Defendant in the sum of \$112,500;
 - (c) Whether an interest at the rate of 10% per annum from 24th October, 2011 until full payment be granted; and
 - (d) Costs of this action.

LAWS and PRINCIPLES relating to summary judgment

17. The Plaintiff may, under *ORDER 14 RULE 1* of the *HIGH COURT RULES 1988*, 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).

18. 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 claimed"
(Emphasis added).

FACTS FROM THE AFFIDAVITS FILED

Uday Raj Sen's- Affidavit Summarised

19. The Plaintiff's contention is that the Defendant owes a sum of \$112,500 for the sale and purchase of a Caterpillar Digger No. FA 552 to the Defendant on 20th October, 2011.
20. In mid-October, 2011, Anand Kumar, a Director of the Defendant Company together with his managing Director Gul Mustaq Ali had a meeting with the Managing Director of the Plaintiff Company Uday Raj Sen and showed his interest in purchasing the aforementioned Digger.
21. Both, Anand Kumar and Uday Raj Sen agreed at a sale price of \$135,000 VIP and on an as is where is basis and an arrangement was made for Anand Kumar and his manager to take possession of the Digger from the Plaintiff's yard located at Waimalika, Nadi. A proforma invoice no. 00805 dated 20th October, 2011 was also issued.
22. The parties to the proceedings also had discussions with regards to the defects that the Digger had and the Defendant was informed that this Digger was in operational condition.

23. The Defendant never denied repainting and servicing the Digger and used it at the Suva Remand Centre work site, Sawani and in Tailevu without carrying out the normal maintenance and repair works that such machine requires. The Digger was certified OHS and LTA respectively.
24. On 15th February, 2012, the Defendant promised to make payment by 31st March, 2012, if the Plaintiff had reduced the purchase price to \$112,500. An amended proforma invoice dated 15th February, 2012 was issued for \$112,500 and to settle the account on the reduced amount.
25. Numerous letters were written to the Defendant seeking payment and a Demand Notice was also issued but still no payments were forth coming.
26. Now that the Defendant, after using the Digger for a period of 6 months states that the Digger requires a lot of repairs.
27. There is no documentary evidence that the Defendant will not purchase the Digger or that it will return the Digger within one week of taking possession on 22nd October, 2011.
28. However, Anand Kumar also informed Uday Raj Sen by text message of 30th January, 2012 at 4,28 p.m. from +6797795698 (paragraph 4 (xx) of Sen's affidavit filed on 13th February, 2015), that he requires further time to make the payment as he had issues with his clients on his worksites.
29. All statements about the need to test the Digger or that there were defects in the Digger are self-serving statements in a bid to avoid paying the purchase price of the Digger after using it for several months and leaving the Digger in a decrepit state of repairs.
30. An application was made by the Defendant to Credit Corporation (Fiji) Limited for finance of this equipment which did not eventuate as it was withdrawn.
31. The Digger is still in the Defendant's possession who has taken out parts from the Digger now.
32. As such, there is no defence established by the Defendant and therefore Summary Judgment is sought for accordingly.

Anand Kumar's- Affidavit Summarised

33. On the other hand, the Defendant's contention is that the Plaintiff is claiming a sum of \$112,500 from the Defendant with interests and costs in respect of a Caterpillar Digger which it allegedly sold to the Defendant Company on or about October, 2011.

34. The Defendant denies that it is liable to pay the aforementioned sum as claimed rather alleges that in October, 2011 the Defendant's Director and the General Manager travelled to Nadi to view the Digger up for sale. The Digger could not be tested for its full functionality and therefore had to be conveyed to Suva for proper testing.
35. Upon testing the Digger, the Defendant discovered that Digger's engine was heating up, the pumps were faulty and the ramp that tightens the link and the track was broken. Taking into account the cost of repairs against the purchase price, the Defendant decided not to buy the Digger.
36. The Defendant states that at no time any contract was formed for the sale and purchase of the said Digger.
37. Therefore, the court must refuse the summary judgment application because the issues of contention between the parties require a careful determination of facts and evidence that can only be adduced at a trial proper.
38. The Defendant states that there is Defence on Merits.
39. There is no evidence of contract to sell, the Digger has Mechanical Defects, there is no valuation report on the Digger as to confirm the value at \$140,000, no evidence that the Land Transport Authority (LTA) has inspected and registered the said Digger as averred by the Plaintiff.
40. Further there is no evidence as to the usage of the Digger by the Defendant. Whether the Defendant used the Digger for long periods of time at various sites as alleged by the Plaintiff needs to be determined at a proper trial.
41. Whether there was any deposit made or sought at the time of the release of the said Digger.
42. The Defendant seeks that summary judgment application ought to be refused with costs to the Defendant.

ANALYSIS and DETERMINATION

43. The Plaintiff brought this action against the Defendant by a Writ of Summons filed on 10th September, 2014 and sought, inter alia, judgment in the sum of \$112,500 together with 10% interest per annum from 24th October, 2011 until full payment and costs of this action.

44. The **plaintiffs claim** arose out of a sale and purchase of a Caterpillar Digger to the Defendant on an **as is where is basis** in the sum of \$135,000 on or about the 20th October, 2011, pursuant to a Proforma Invoice No. 0085.
45. The Defendant filed an **acknowledgment of service** on 20th April, 2014 followed by a **Statement of Defence** on 01st May, 2014 in order to oppose, rather, contest the claim within the proceedings.
46. The **defendant resisting the summary judgment must establish that there is an issue or question in dispute** with respect to the claim or the part of the claim which ought to be tried or there ought for some reasons to be a trial of that claim or part. If the defendant fails to do so, then the court will enter summary judgment against the defendant on that claim or part pursuant to *Ord. 14, r.3* of the *HCR.,1988*.
47. Some four months later, on 10th September, 2014 the plaintiff filed the application for **summary judgment** claiming a sum of \$112,500 together with 10% interest per annum from 24th October, 2011 until full payment and costs of this action as well.
48. Pursuant to *Ord. 14, r. 1 (1) of the HCR, 1988, where in an action to which this 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, apply to the court for summary judgment against that defendant.*
49. *Further, pursuant to Ord. 14, r.1 (2), subject to paragraph (3), this rule applies to every action begun by Writ other than an action which includes a claim by the Plaintiff for libel, slander, malicious prosecution or false imprisonment, and an action which includes a claim by the Plaintiff based on an allegation of fraud. Sub paragraph (3) stipulates that this order shall not apply to an action to which Order 86 applies.*
50. Bearing in mind the above provision of the law, it is therefore important that I must decide whether **summary judgment** is available to the plaintiff in this case with regards to his **nature of the claim**.
51. In this case, the writ of summons was served and the defendant has given **notice of intention to defend** the action. The plaintiff therefore is **entitled**, pursuant to *Ord.14*, to apply for summary judgment against the defendant. It is to be noted that the plaintiff need not wait for the defendant to file a statement of defence to make the application for summary judgment. Further, the filing of a statement of defence before an application for summary judgment does not preclude an application being made, nor does it prevent summary judgment being granted if the court is of the view that there is no defence to the claim.

52. The Fiji Court Appeal in *Carpenters Fiji Ltd v Joes Farm Produce Ltd* [2006] FJCA 60; ABU 0019U of 2006S (10 November 2006), Case dealing with summary judgment application, laid down the well-established principles in relation to the entry of summary judgment under paragraph 21 as follows:

(a) *"The purpose of 0.14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up, a bona fide defence or raise an issue against the claim which ought to be tried.*

(b) *The defendant may show cause against a plaintiff's claim on the merits e.g. that he has a good defence to the claim on the merits or there is a dispute as to the facts which ought to be tried or there is a difficult point of law involved.*

(c) *It is generally incumbent on a defendant resisting summary judgment, to file an affidavit which deals specifically with the plaintiff's claim and affidavit and states clearly and precisely what the defence is and what facts are relied on to support it*

(d) *Set off, which is a monetary cross claim for a debt due from the plaintiff, is a defence. A defendant is entitled to unconditional leave to defend up to the amount of the set off claimed. If there is a set off at all, each claim goes against the other and either extinguishes or reduces it *Hanak v Green* (1958) 2 QB 9 at page 29 per Sellers LJ.*

(e) *Likewise where a defendant sets up a bona fide counter claim arising out of the same subject matter of the action, and connected with the grounds of defence, the order should not be for judgment on the claim subject to a stay of execution pending the trial of the counter claim but should be for unconditional leave to defend even if the defendant admits whole or part of the claim. *Morgan and Son Ltd - v - Martin Johnson Co* (1949) 1 K 107(CA).*

See 1991 The Supreme Practice Vol 1 especially at pages 146, 147,152 and 322."

53. Reference is also made to the *Halsbury's Law of England* (4th Ed) Volume 37 para 413-415, which states as follows-

413: Defendant showing cause:

Where the Plaintiffs application for summary judgment under Order 14 is presented in proper form and order, the burden shifts to the defendant, and it is for him to satisfy the court and 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. Unless the defendant does so, the court may give such judgment for the plaintiff against the defendant as may be just having regard to the nature of the remedy or relief claims.

The defendant may show cause by affidavit or otherwise to the satisfaction of the court. He must “condescend upon particular”, and, in all cases, sufficient facts and particulars must be given to show that there is a genuine defence. The defendant must serve his affidavit on the plaintiff or his solicitor at least three days before the return day. The affidavit may contain matters of hearsay provided the sources of information and grounds of belief are disclosed. The court has power to order a defendant showing cause or an officer of a body corporate to produce any document, and to attend and be examined on oath if there are special circumstances making it desirable to do so. By necessary implication, the obligation on the defendant to show cause allows the plaintiff to answer the defendant's case.

414: Unconditional leave to defend:

The power to give summary judgment under Order 14 is intended to apply only in clear cases, where there is no reasonable doubt that the plaintiff is entitled to judgment and where it is entitled to judgment and where it is inexpedient to allow a defendant to defend for mere purposes to delay. Leave to defend will therefore be given where the defendant shows that he has a fair case, that there is an issue or question which ought to be tried, or that there are reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence.

However, the defendant does not have to show a complete defence, but only a fair probability of a defence, or that there is a real substantial issue or question to be tried, or that there is a dispute as to facts or law which raises a reasonable doubt whether the plaintiff is entitled to judgment. The procedure under order 14 was not intended to shut out a defendant who could show that there was an issue or question that ought to be tried or that for some other reason there ought to be a trial.

Leave to defend will be given where the amount recoverable to be clearly subject to a reasonable inquiry or to an account being taken.

415: Conditional leave to defend:

The court may give a defendant against whom an application for summary judgment is made under Order 14 leave to defend the action with respect to the claim, or the part of the claim, to which the application relates either unconditionally or conditionally, that is, on such terms as to giving security or time or mode of trial or otherwise as the court thinks fit. Conditional leave to defend will be granted where the court forms the view, on the material before it, that the defence set up is a sham defence or it is shadowy, or that there is little or no substance in it or that there is something suspicious in the defendant's mode of presenting his case or the master is very nearly prepared to give judgment for the plaintiff. However, if there is no sign of bad faith nor anything to show that the defence is a sham nor any suspicious circumstances as to the mode of presenting the case, leave to defend should not be conditional, nor should it be conditional where the practical result would be likely to deprive the defendant unjustly to his defence. The usual form of conditional leave to defend requires the payment of the whole or part of the claim into court.

54. Reference is also made to the case of *Metal works & Joinery Limited v Fiji Islands Revenue & Customs Authority*, Justice Pathik applying the Court of Appeal decision delivered by Greig J in *Australia Guarantee Corporation (NZ) Ltd-v- Mc Beth* [1992] 3 NZLR 54 at 58 held in determining the issue before him on the facts and circumstances of this case:-

'The summary judgment procedure is a simple expeditious way to enable a plaintiff to obtain judgment where there is no real defence to the claim made see Pemberton v Chappell [1987] 1 NZLR 1 at 2. The essence of the procedure is the plaintiffs own verification by affidavit of his own statement of claim and the allegation made in it: Harry Smith Car Sales Ltd v Clay com Vegetable Supply Co Pty Ltd [1978] 29 ACTR 21. There has to be balancing between the right of the defendant to have his day in court and to have his proper defences explored and the appropriate robust and realistic approach called for by the particular facts of the case: see BilbyDimock Corporation Ltd v Patel [1987] 1 PRNZ 84 and Cegami Investment Ltd v AMP Financial Corporation [NZ] [1990] 2 NZLR 308 at p. 313. Although the onus is upon the plaintiff there is upon the defendant a need to provide some evidential foundation for the defences which are raised. If not the plaintiffs verification stands unchallenged and ought to be accepted unless it is patently wrong.'

55. The affidavit of Uday Raj Sen filed on behalf of the Plaintiff Company reveals that a Caterpillar Digger was released to the defendant Company Modern Investments Services Limited in anticipation of the sale in the sum of \$135,000. A proforma invoice was issued to the defendant on 20th October, 2011 and the particulars on the invoice read as follows-

'Caterpillar 320 Digger with all accessories including two buckets in good running order. Goods to be picked up from Waimalika in Nadi by Anand Kumar & Mustaq Ali.

There is another section at the left hand bottom corner of the invoice in very small letters that is not legible. This seems to contain certain important conditions to the sale of the Caterpillar Digger in question.

56. His affidavit does not state and confirm or reveal that any sale and purchase and or Bill of sale as well as any deposit was made towards the alleged purchase of this Caterpillar Digger in question. There is or are no documentary evidence annexed to the affidavit to support the Plaintiffs claim except for the proforma invoice issued on 20th October, 2011.
57. Apart from this whether there was any agreement or condition between the parties to the proceedings (Uday Raj Sen and Anand Kumar) that the Caterpillar Digger will be returned in within one week's of taking possession on the 20th October, 2011.
58. The Managing Director of the Defendants Company, Gul Mustaq Ali also accompanied his Director Anand Kumar to discuss the sale of the Caterpillar Digger with the Managing Director of the Plaintiff Company Uday Raj Sen in his office, and later on Gul Mustaq Ali also drove down with Anand Kumar to Waimalika, Nadi to pick up the Caterpillar Digger. Gul Mustaq Ali will be aware as to what transpired in the discussion as to the sale and up to the time the Caterpillar Digger was eventually picked up from Nadi and taken away to Suva. There is no affidavit of Gul Mustaq Ali filed to confirm anything in this case.
59. This court is of the view that his evidence on the substantive issue impending determination before this court will be of some significance and that now can only be ascertained through a full hearing.
60. It is also important to add that when Anand Kumar and Gul Mustaq Ali went down to pick the Caterpillar Digger from the yard of the Plaintiff in Nadi, there must have been someone there holding the responsibility of the Plaintiff Company's yard who had eventually released the Caterpillar Digger in question, and he may be an important witness as well as to what transpired between them there. This person's (Third party) affidavit was also not filed for courts consideration, and this person's evidence may enlighten how the Caterpillar

Digger was loaded on to the Truck. This person may also be able to confirm if the Caterpillar Digger was tested in the Nadi yard or not and what happened.

61. It is still unclear to this court whether the Caterpillar Digger in question after being taken possession by Anand Kumar carried out work at the Suva Remand Centre, Sawani and in Tailevu, and for what period of time (if any).
62. It is also unclear and important to ascertain as to why the initial price of the Caterpillar Digger of \$135,000 as reflected on the initial proforma invoice was reduced to that of \$112,500 and hence a summary judgment sought for this amount. Whether it was because of the defects found on the Caterpillar Digger or that Anand Kumar was given a discount to allow him to settle the alleged purchase amount.
63. Apart from the above issues that need clarifications, there are other tribal issues that need the attention of the court before a just and fair decision could be made accordingly.
64. I have also given a very careful consideration to the following before arriving at a decision-
 - (i) The Summary Judgment application filed by the Plaintiff with a supporting affidavit of Uday Raj Sen;
 - (ii) The Affidavit in Reply of Anand Kumar;
 - (iii) The Facts before this court in terms of the affidavits filed herein;
 - (iv) The Written Submissions by the Plaintiff's Counsel;
 - (v) The Written Submissions by the Defendant's Counsel;
 - (vi) The Provisions of the applicable laws in this case; and
 - (vii) The case authorities.
65. The power to give summary judgment under Order 14 is intended to apply only in clear cases, where there is no reasonable doubt that the plaintiff is entitled to judgment and where it is entitled to judgment and where it is inexpedient to allow a defendant to defend for mere purposes to delay. This is the law. In this case there are obviously many tribal questions that need to be answered and the only way this can be ascertained is through a full hearing of the witnesses and the evidence as to the facts in this case.

65. This is not a proper case that should be determined by an application for summary judgment but must proceed on to a full hearing and then determined.
66. The Caterpillar Digger was picked up from the Plaintiff's yard in Waimalika, Nadi on 22nd October, 2011 and remained in the possession of the Defendant to the present time. There is evidence and the Counsel representing the Defendant has also confirmed in her submissions that the Caterpillar Digger in question is sitting in Sawani, Nausori. Some of the valuable parts of the Caterpillar Digger has been dismantled and kept in the custody of the Defendant Company by Anand Kumar. It is understood from these facts that the Caterpillar Digger is subject to deterioration. Calculating the time period lapsed from 20th October, 2011 to date, it is some 3 years and 5 months that this Digger has been in possession of the Defendant. By the time this case is assigned before a High Court Judge for hearing and determination, it may take some time. Therefore in the circumstances, it has become appropriate that I invoke the provisions of *Order 14 Rule (3) of the High Court Rules 1988* and order that the Defendant deposit an equivalent amount of \$112,500 into the Chief Registrar's interest bearing account until the final determination of the substantive matter in this case.

Order 14 Rule 4 (3) states-

'The Court may give a defendant against whom such an application is made leave to defend the action with respect to the claim, or the part of a claim, to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit.'

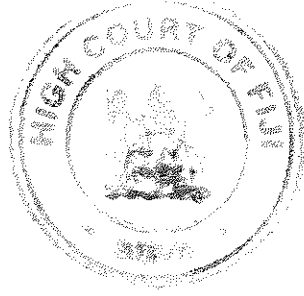
(As emphasized by me at paragraph 67 hereinabove).

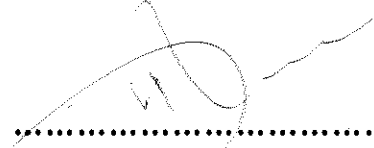
68. For the aforesaid rationale, Following are the Final Orders of this court.

FINAL ORDERS

- (a) The Summons for Summary Judgment is dismissed.
- (b) The Defendant is hereby ordered to deposit an equivalent sum of \$112,500 into the Chief Registrar's interest bearing account within 21 days until the final determination of this case.
- (c) Parties to the proceedings must ensure to take consequent causes of action in terms of the Rules and the set down Procedures in order to complete all pleadings expeditiously so that the case can be allocated to a Judge for hearing and determination.
- (d) Cost of this action is summarily assessed at \$500 to the Defendant.

- (e) Case listed for mention on 21st April, 2015 at 9 am for further directions and consequent cause of action.




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VISHWA DATT SHARMA
Master of High Court, Suva
Tuesday, 31st March, 2015.