

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 368 of 2013

BETWEEN : GOLD CENTURY COMPANY (FIJI) LIMITED a Limited liability company having its registered office at Suva in the Republic of Fiji.

PLAINTIFF

AND : AVON INVESTMENTS LIMITED a limited liability company having its registered office situated at Suva in the Republic of Fiji.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSEL: Ms Radhika Naidu - for the Plaintiff
Mr. Willy Hiware - for the Defendant

Date of Hearing: 02nd June, 2016

Date of Ruling : 25th August, 2016

JUDGMENT

[Summons for summary judgment pursuant to Order 14 Rule 1 and Order 86 Rule 1 (c) of the High Court Rules, 1988 and the inherent jurisdiction of this Honourable Court]

INTRODUCTION

1. The Summons is filed by the Plaintiff seeking for the following orders-

- (i) *An Order that Summary Judgment be entered against the Defendant herein in the sum of \$275,000 (Two Hundred and Seventy Five Thousand Dollars);*

- (ii) *Interest thereon at the rate of 6% per annum from 23rd August, 2013 until full payment; and*
 - (iii) *Costs of this action.*
2. This application is filed in support of an affidavit deposed by Fugang Zhao.
 3. The application was made pursuant to *Order 14 Rule 1 and Order 86 Rule 1 (c) of the High Court Rules, 1988 and the inherent jurisdiction of this Court.*
 4. The **Defendant** filed an affidavit in opposition and opposed the Plaintiff's application.
 5. The Plaintiff and the Defendant filed written submissions with case authorities and the Summons for Summary Judgment proceeded for hearing on a defended basis.

BACKGROUND FACTS

6. The **Defendants** are the registered proprietors of the following properties:
 - (i) Certificate of Title Register Vol. 55 Folio 5486 known as Tamavua (part of) in the District of Suva in the Island of Vitilevu having an area of 6 acres 3 roods 19 perches;
 - (ii) Certificate of Title No. 8281 being Lot 1 on Deposited Plan No. 1956 known as Tamavua (part of) in the District of Suva in the Island of Vitilevu having an area of 6 acres 12 perches;
 - (iii) Certificate of Title No. 6663 being Lot 1 on Deposited Plan No. 1250 known as Tamavua (part of) in the District of Suva in the Island of Vitilevu having an area of 2 acres 3 roods 17 perches;
7. The Plaintiff's claim is based on the **Sale & Purchase Agreement** it entered into with the **Defendant** on 17th January, 2013.
8. The **Defendants** are the **vendors** whereby they agreed to transfer the said property for the consideration sum of **\$5,500,000.00 (Five Million and Five Hundred Thousand Dollars)** as per the clauses 3.1 and 3.2 in the **Agreement**.
9. The Plaintiff paid the **Defendant** the sum of **\$275,000.00 (Two Hundred and**

Seventy Five Thousand Dollars) as deposit in three installments, namely 18/01/2013, 25/01/2013 and on 29/01/2013.

10. The **Agreement** was also subject to certain conditions in which the said sale was subject to the approval of the **Minister for Lands** first and any other **Governmental Authority** whose consent or approval is required in terms of clause 24.1 of the Agreement.
11. The date of settlement in terms of clause 4.1 of the Agreement was to be within six months from the date of agreement [17th January, 2013] or such other date as may mutually agreed in writing between parties. Allegedly, the six months period had expired and the consent of the **Minister for Lands** was not obtained.
12. According to the Plaintiff, the Agreement had lapsed and the part payment made by the Plaintiff was to be refunded, and has not been refunded.
13. The Plaintiff now seeking refund of its monies through demand letters.
14. The Plaintiff says he has performed all its obligations under the said Agreement but it was the Defendants who have failed to honour their obligations under the **Sale & Purchase Agreement**.
15. The Plaintiff instituted this claim against the Defendant seeking orders for specific performance and other alternative orders.
16. The Defendant has filed a Statement of Defence and the Plaintiff submitted that there is no Defence.

THE LAW

17. The Plaintiff is making an application for summary judgment on specific performance pursuant to *Order 14 Rule 1 and Order 86 Rule 1 (c) of the High Court Rules* which states:

Application by Plaintiff for summary judgment

1-(1) *In any action begun by writ indorsed with a claim-*

- (a) *For specific performance of an agreement (whether in writing or not) for the sale, purchase, exchange, mortgage or charge of any property, or for the grant of assignment of a lease of any proper try, with or without an alternative claim for damages, or*
- (b) *For rescission of such an agreement, or*
- (c) *For the forfeiture or return of any deposit made under such an agreement, the Plaintiff may, on the ground that the Defendant has no defence to the action, apply to the Court for judgment.*
18. It is trite law that relief under *Order 86* is much in common with *Order 14 of the High Court Rules* which states:

Order 14

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 defense to a claim included in the writ, or to a particular part of such a claim, or has no defense 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) *Subject to paragraph (3), this rule applies to every action begun by writ other than-*
- (a) *an action which includes a claim by the plaintiff for libel, slander, malicious prosecution or false imprisonment,*
- (b) *an action which includes a claim by the plaintiff based on an allegation of fraud.*
- (3) *This Order shall not apply to an action to which Order 86 applies.*

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 that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against the defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.*
- (2) *The Court may by order, and subject to such conditions, if any, as may be just, stay execution of any judgment given against a defendant under this rule until after the trial of any counterclaim made or raised by the defendant in the action.*

ANALYSIS and DETERMINATION

19. In an action for **Specific Performance** of an Agreement for sale of any property, the Plaintiff may apply to Court for summary judgment on the ground that the **Defendant** has **no defence to the action** (Order 86, Rule 1 (1) refers) of the High Court Rules, 1988.
20. In the case of **specific performance** the burden is on the **Defendant** to satisfy the Court 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 the action (Order 86 Rule 3). Thus it is for the Defendants to establish why judgment should not be entered against them.
21. The Defendant filed its **Defence** to the substantive Writ action and filed an **Affidavit opposing** the Plaintiff's application and **showed cause** why an **Order for specific performance** coupled with other **alternative orders** sought, should not be made.
22. The **Defendant** submitted that there are **disputed facts and issues** that must be tried in open Court in this matter and therefore, dismiss the Plaintiff's application seeking summary judgment.

23. In his **Statement of Defence**, the Defendant in reply to the Plaintiff's **Statement of Claim** at paragraphs 4, 5 and 6 stated as follows-

(i) 'Paragraph 4 is denied and that the Plaintiff breached the agreement since it failed to pay the \$275,000 upon signing the agreement on the 17th January, 2013 but paid the same in installments as follows-

- \$75,000 - 18th January, 2013;
- \$100,000 - 25th January, 2013; and
- \$100,000 - 29th January, 2013.

(ii) Paragraph 5 is denied and that it was upon the Defendant to obtain consent from the Minister for Lands and approvals from other Government Authorities subject to excavation work. The Defendant failed within the 6 months. Therefore it is the Defendant that breached the said agreement. The Plaintiff has a right to forfeit the fund as liquidated damages to the breach of the said agreement.

(iii) Paragraph 6 is denied and states that it is upon the Defendant obliging under the laws to obtain the consent of the Minister for Lands and approvals from the relevant Ministers which it failed to do so within the 6 months. Defendant further states that it has exercised its rights under 12.1 (b) of the agreement and has a right to forfeit the said deposit sum as liquidated damages."

(Underline is mine for deliberation)

24. In reply to the Defendant's **Statement of Defence**, the Plaintiff stated as follows-

(i) "Paragraph 4- The Plaintiff avers that the deposit and part payment was made to the Defendant soon after the agreement was signed. The Defendant took no objection and accepted the same and the Defendant is now therefore estopped from alleging that the Plaintiff breached the agreement.

(ii) Paragraphs 5 and 6- The Plaintiff avers that the agreement was subject to and conditional upon the consent of the Minister for Lands First being obtained. The Defendant in breach of the agreement did not cooperate to apply for such consent within 6 months as required under the agreement. The Plaintiff is entitled to refund of the deposit paid to the Defendant."

25. Having carefully read and perused what the Defendant had to say in his Statement of Defence at paragraphs 4, was the Plaintiff in breach of the Sale and Purchase Agreement?

And at paragraph 5 and 6 above, doesn't that tantamount to the Defendant admitting the fact that the responsibility to obtain the Consent and approval was that of his own, as the Defendant in this case? Should the Court then not clarify this ambiguity created by him on a hearing? The Answer is that the Court should in all just and fairness.

No doubt, the Plaintiff in terms of paragraph 4 states as a fact, that the deposit and part payment was not made at the time the agreement was signed but soon after the signing took place and the Defendant did not have any objections then.

In terms of paragraphs 5 and 6, the Plaintiff states it was the Defendant who did not cooperate with the Plaintiff in obtaining the Consent.

26. Paragraph 24 of the Sale and Purchase Agreement deals with the provision for Consent which states as follows-

"This sale is subject to the approval of the Minister for Lands First being obtained and any other Governmental Authority whose Consent and or approval is required."

27. Above provision relating to Consent does not clearly and specifically state as to who was responsible in obtaining this Consent from the Minister for Lands? As far as this Court is concerned, if the parties were serious and genuine about the sale and purchase, then it became the responsibility of both parties to cooperate with each other and deal with Consent to enable the sale eventuate. This did not happen for the reasons best known to both parties. This Court can only through a hearing and not by way of a Summary Judgment application, then ascertain what transpired and why are both parties alleging each other for not fulfilling their obligations as was required in terms of the sale and purchase agreement.

28. The Defendant also filed a reply to the affidavit sworn by Jung Mook Jun on the 19th September, 2014.

29. According to the **Defendant**, following are the **tribal issues** in the matter-
- (i) *Whether the deposit sum is refundable or not?*
 - (ii) *Whether the Sale and Purchase Agreement is uncertain on the issue who is to apply for consent from the Minister of Land?*
 - (iii) *Whether there is uncertainty on the extension and termination of the Sale and Purchase Agreement?*
 - (iv) *Whether the Plaintiff's failure to comply with conditions imposed by the Local Authorities amounted to breach of the Sale and Purchase Agreement hence stopped in law from claiming deposit fund?*
 - (v) *Whether the Sale and Purchase Agreement is void and or uncertain and or unenforceable and or is unlawful?*
 - (vi) *Whether Sherani & Company's negligent failed to advise the Plaintiff and Defendant on the issue of which party to obtain consent from the Minister within the 6 months?*
30. **On the other hand**, the **Plaintiff** who had entered into the Sale & Purchase Agreement with the **Defendant** says that he has fulfilled his obligation and that the **Defendant** has failed in its bid to obtain the **Consent** and did not even cooperate with the Plaintiff to obtain the **Consent**. Further, the Plaintiff states that if there was no consent to the Sale and Purchase Agreement, then it cannot be binding on the parties. The Defendant cannot therefore retain the Plaintiff's monies claiming it to be liquidated damages. This is contrary to the argument that the Plaintiff did not obtain Ministerial Consent. Therefore, the Plaintiff is seeking for orders as prayed for in his Summary Judgment application.
31. The argument raised at paragraph 30 is a **Question of Law** that cannot be determined by a Summary Judgment application. The Court needs to peruse the entire Sale and Purchase Agreement in its entirety, hear the evidence of the parties together with the **impending issues raised hereinabove** within the current Summary Judgment application by both parties and determine the case accordingly.
32. I find as a fact that there are **triable issues** which should be tried within a Hearing accordingly.
33. In the light of my observations hereinabove, I wish to make reference to the following case authorities which are rather pertinent and useful to bear in mind-

Express Newspapers Plc v News (UK) Ltd and Others [1990] 3 All E.R. 376 at 379 Browne-Wilkinson V-C said:

"Summary judgment under Order 14 is a judgment given in the clearest cases before an ordinary trial has taken place. Summary judgment is only given where it is clear that there is no arguable defence to the claim. If there is an arguable issue to be tried, in particular where there are matters of fact to be resolved which can only be resolved at trial, the court gives leave to defend and the case goes to trial to be heard out. Summary judgment is a means of short-circuiting that system in the clear case where it is shown that, even if it went to trial, the defence could not succeed".

34. In summary judgment procedure, as was held in *Maclean v Stewart unreported, 20 August 1997, CA 288/96*, the Court of Appeal confirmed an important principle of the summary judgment procedure, that the onus remains on the plaintiff throughout to establish that the defendant has no defence.
35. The Plaintiff in the current case before me, in my observations has not satisfied this Court that the Defendant does not have a **Defence** or rather the **Defence is a sham Defence**.
36. Therefore, the Plaintiff's **Summary Judgment application** has to be accordingly **dismissed**. To do otherwise, in my view, the Court will be embroiling itself in deciding the merits of the pending claim rather than confining itself to the pertinent issue **whether there was an arguable defence**.
37. This Court has found that there are **triable issues** in this case. It is noteworthy in the circumstances to make reference to the judgment of **Greer L.J in Powszechny Bank Zwiakony W Polsch v Paros (1932) 2 K.B. 353**. At p.359 **Greer L.J. said -**

"It has long been the rule that in proceedings under Order XIV, what the Court, whether this Court or the King's Bench Division, has to ascertain is whether there is a triable issue. If there is, no matter how strongly the Court may anticipate that it will be decided in the plaintiff's favour, it must order a trial."

"All the defendant need say is that he requires the plaintiff to prove his case, and the law puts upon the plaintiff the onus of proving it. When the defendant says he does not admit the claim he need not carry the case any further than to say: 'There is a triable issue and I want to have it tried'.

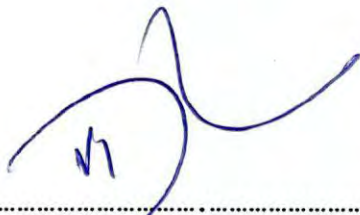
IN CONCLUSION

38. For the aforesaid rational, I make the following orders:

- (i) The Plaintiff's Summary Judgment application is hereby Dismissed.
- (ii) The costs to be reserved until the final hearing and determination of the substantive action.
- (iii) Matter to take its normal cause.

Dated at Suva this 25th Day of August, 2016




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VISHWA DATT SHARMA
Master of High Court, Suva

cc: Ms Radhika Naidu, Naidu Law.
Mr. Willy Hiware, H M Lawyers.