

IN THE HIGH COURT OF FIJI AT LAUTOKA

CIVIL JURISDICTION

Civil Action NO. HBC 98 of 2011

BETWEEN : **FIJI DEVELOPMENT BANK** a body corporate duly constituted under the Fiji Development Bank Act, Cap 214 having its registered office at 360 Victoria Parade, Suva in Fiji.

Plaintiff

AND : **MOAPE NAGATA and ALESI NAGATA** both of Malolo, Nadi in Fiji.

Defendants

Counsel : Ms Shiu Choo for plaintiff

: Ms V Salote for defendants

Date of Trial : 08 July 2016

Date of Judgment : 05 October 2016

J U D G M E N T

Introduction

[01] Fiji Development Bank ('FDB'), the plaintiff brought this action against Moape Nagata and Alesi Nagata, the defendants claiming amongst other things judgment in the sum of \$140,356.33 with interest and costs.

[02] The defendants denied the claim and counterclaimed against the plaintiff amongst other things judgment in the sum of \$140,356.33 with interest and costs.

- [03] It will be noted the defendants' counterclaim is for the same amount that the plaintiff claims in its writ of summons.
- [04] At the trial, the plaintiff called Mohammed Jaffar as witness ('P/W1') and tendered in by consent the Agreed Bundle of Documents as P/Exhibit 1-71.
- [05] The defence called Moape Nagata, the first defendant ('D/W1'). The defendant tendered in no documents.
- [06] Both parties also filed their respective written submission. I am grateful for their comprehensive written submission.

Plaintiff's Case

- [07] The facts according to the plaintiff were as follows:
- [08] The defendant made an application to the Plaintiff seeking approval for loan facility for the purchase of Native Lease No. 18881 located on lot 2 Kurakura ("Mortgage Property") for a consideration sum of \$140,000.00. The Plaintiff approved mortgage facility for a sum of \$131,000.00 being the principal sum ("Principal Sum") and issued a Loan offer letter in January 2005. The Defendants accepted the offer. They executed the Mortgage documents in June 2005. The document inter alia entailed the interest rate payable for such period on the Principal Sum which was subject to change and further encompassed the right and obligations of the mortgagee and the mortgagor in the event of default.
- [09] Upon preparation of the mortgage documents the Plaintiff as required under mortgage procedures, advised the Defendants to seek independent legal advice and have the Mortgage documents witnessed by a solicitor. Accordingly his solicitor, Mr Siddharth Nandan advised and witnessed the mortgage documents.

- [10] A sum of \$8,800.00 was transferred from the 2nd Defendant's FNPF account to the Plaintiff, being the deposit sum over the Mortgage Property.
- [11] Shortly thereafter the Defendants defaulted in mortgage repayments and the Plaintiff issued several arrears notices. The Plaintiff also issued a letter and notified the Defendants of the increased variable interest rate on the loan account. The interest rate imposed on the defendants was 11.90% under Residential Owner.
- [12] The defendants continued to default in the loan repayments and the Plaintiff exercised recovery action. The Plaintiff conducted a valuation through Bayleys and provided the Plaintiff with the valuation report.
- [13] The Mortgage Property was advertised in the dailies and several tenders were received. Of all the tenders received the Plaintiff accepted one tender sent by one Aruna Devi for the sum of \$145,000.00. The defendants refused to vacate the property and kept on asking further time to settle the arrears. As a result, Aruna Devi withdrew her tender and refused to purchase the Mortgage Property. The Plaintiff issued a notice to quit through their solicitors and shortly thereafter High Court Civil Action no. 224 of 2009 was commenced against the Defendants. However, the parties agreed to a terms of settlement, which was made orders of the Court and vacant possession was ordered by the Court.
- [14] By private sale the Plaintiff re-advertised the Mortgage Property and only \$100,000.00 was the highest tendered offer despite that the Mortgage Property being valued at \$166,000.00 as market price by Bayleys. The Plaintiff sold the Mortgage Property at the highest tender being \$100,000.00 to a Sharoon Riaz Ali. The sale proceeds were credited into the Defendants' Loan Account. As at the date of sale of the Mortgage Property the Defendant's loan account stood with arrears and interest, at \$140,456.33. The sale proceeds were insufficient to cover the debts. The

plaintiff issued a demand notice to settle the balance on the loan facility with interest at 10.25%.

Defendant's Case

- [15] In the statement of defence and counterclaim the defendants state the following.
- [16] The Defendants admit the default and the consequent sale of the property under mortgagee sale, however dispute that they still owe a balance sum of \$140,356.33 as at 31st March 2011 or that they are liable to payment of interest of 10.25% per annum.
- [17] The plaintiff's loan approval for the purchase of the property comprised in Native Lease No. 18881 and the sale by mortgagee sale was done through a fraudulent scheme with the knowledge of the Plaintiff and its officers and/or agents designed to unjustly enrich the Plaintiff at the expense and at the detriment of the Defendants.
- [18] The defendants in seeking a loan for the purchase of the Native Lease No. 18881 together with the residential dwelling comprised therein was required to arrange a valuation which said valuation was organised by the Plaintiffs, its officers and/or agents and the said valuation jacked/hiked up the value of the property to enable the Defendants to decrease their direct contribution and also giving a false valuation.
- [19] As a result of the jacked/hiked valuation, the Defendants paid for more than what the property was worth and this was to their detriment.
- [20] The Defendants purchased the said property for their personal residential use and untitled all their savings in the purchase of the same.
- [21] The Plaintiffs in carrying out a sale of the property through mortgagee sale failed to obtain/realise a tender equivalent to or above the market values.

[22] The Plaintiffs, their officers and agents acted fraudulently resulting in loss and detriment of the Defendants.

The Plaintiff's Reply to Defence and Counterclaim

[23] The plaintiff denies that its officers and/agents were engaged in any fraudulent scheme as claimed and says that the valuation report was conducted by the Northern Property Valuation and Consultants whereby Market Valuation was undertaken and factors such as the size of the block, tenure, zoning, design of the building as an investment, desirability of location and all improvements were taken into account. As a result, Northern Property Valuation and Consultants presented a Market value of \$195,000.00. The plaintiff further states that the valuation undertaken was done without any input or interference by its agents and/servants. The plaintiff also states that the property was advertised under mortgagee sale and that a tender amount of \$100,000.00 was offered for the property.

Agreed Facts

[24] The following matters were agreed by the parties at the Pre-Trial Conference ('PTC'):

1. ***By*** loan letter dated 18th January 2008, the Plaintiff agreed to advance loan facilities of \$131,000.00 to the defendants.
2. ***The*** loan facility was to enable the Defendants to purchase residential premises comprised in Native Lease No. 18881 for the sum of \$140,000.00.
3. ***The*** Defendants agreed to pay interest at 5% per annum for the first two years; and thereafter at 7.95% per annum.

4. **The** Plaintiff had the right to recall the facility at any time if the account had not been satisfactory.
5. **To** secure the loan facility, the Defendants provided the following securities:
 - (a) First Registered Memorandum of Mortgage No. 566235 over Native Lease No. 18881 and improvements thereon;
 - (b) Assignment over salary proceeds given by Alesi Nagata; and
 - (c) Irrevocable Authority given by Moape Nagata to his bankers for direct deduction of salary proceeds.
6. **The:**
 - (a) Loan facility was drawn down by the Defendants;
 - (b) The property comprised in over Native Lease No. 18881 purchased and transferred to the Defendants;
 - (c) The Plaintiff's First Registered Memorandum of Mortgage No 5665235 over Native Lease No. 18881; and
 - (d) Assignment of salary proceeds and irrevocable Authority to deduct salary proceeds were given by the Defendants to the Plaintiff.
7. **In** due course, the Defendants defaulted in their repayments of the loan facility.
8. **In** January 2011, the Plaintiff exercised its rights under Memorandum of Mortgage No. 5662335 and sold the property comprised in native Lease No. 18881 for the sum of \$100,000.00.

9. **The** \$100,000.00 sale proceeds were credited to the Defendant's Account.
10. **By** letter dated 27th January 2011, the Plaintiff advised the Defendants to settle the debt remaining after the \$100,000.00 sale proceeds were credited to their Account.
11. **The** Defendant failed to settle the residual debt.
12. **By** letter dated 10th May 2011, the Plaintiff advised the Defendants to settle the remaining debts of \$140,356.33 with interest owed at the rate of 10.25% per annum.

Plaintiff's Evidence

[25] The plaintiff marked and tendered in its bundle of documents through PW 1. He in his evidence states that defendant's application for loan was assessed, arrived at the instalments payable by the defendants and a loan facility for a sum of \$ 131,000.00 was approved. The defendants defaulted in the payments and fell into arrears. Letters were sent to the defendants advising them to settle the arrears. The defendant failed. The mortgage property was sold for \$100,000.00 by tender procedure.

[26] Under cross examination PW1 denied that the plaintiff fraudulently issued a loan facility to the defendant with the knowledge that the Defendants were unable to satisfy the loan repayments. He pointed out that the application for loan showed \$29,000.00 as the first defendant's salary. He admitted that the defendants had produced a valuation for loan purpose and that the amount of valuation was \$195,000.00 He also said that the tender that we have received and that was the best \$100,000 that we received. When asked why the Mortgage Property was sold for \$100,000.00 and no higher offers were waited for, PW1 said that no offers were made

and the only highest offer was \$145,000.00 but thereafter the next highest tender received was only \$100,000.00 and given the costs incurred by the Plaintiff, the plaintiff chose to accept the tender.

Defendants' Evidence

- [27] DW1 in evidence states that in 2007 he was sales representative for Colonial Life Insurance and he sold insurance policy and that from 2008 until 2010 he was a landowner representative. He decided to purchase the Mortgage Property under a scheme by the Plaintiff wherein a deposit was required for purchase of property. He provided the Plaintiff with his pay slip and the pay slip shows he earned \$21,000.00 for the period of 2004, which was the salary for his commission earned as he was a sales representative for Insurance in Colonial Life Insurance and he was paid on commission basis.
- [28] He said that the valuation he had provided showed that the valuation was high. The valuation of \$195,000.00 was a fraudulent and that the plaintiff should have checked his background before giving him a bank loan.
- [29] He gave evidence that he wrote to the Plaintiff on numerous occasions and asked for time to pay and he had reiterated to the Plaintiff that he was in financial difficulty and unable to pay his debt. He was dissatisfied with deceitful conduct of the plaintiff in that they had issued him a loan facility when plaintiff ought to have known that he was not in a capacity to pay.
- [30] That the loan officer whom he met face to face at the Nadi Branch of the Plaintiff did not explain anything regarding the interest rate and that the interest rate will go higher or that he had to pay \$791.00 in premium. That the independent solicitor did not explain anything when he signed the mortgage documents.

- [31] He states the bank was fraudulent when accepting the initial valuation. The initial valuation was a fraud. That the initial valuation was hiked up valuation for the mortgage property.
- [32] He said that he was evicted from the mortgage property.
- [33] Under cross examination DW1 states that he did not know how his payslip read \$29,000.00, he remembers that he had put \$21,000.00 and provided the salary slip for the same. When questioned who had provided the Plaintiff the alleged initial valuation, DW1 said he did. Then he was asked whether he is saying that the valuation he provided was a fraud? He said 'yes it was'.
- [34] He admitted that he did not inquire about varying interest rates.

Analysis

- [35] The plaintiff claims from the defendants the sum of \$140,356.33, being the sum due and owing on account of a loan facility the defendants obtained from the plaintiff. The plaintiff gave a loan to the defendants in the sum of \$131,000.00 for the purchase of a property. The property was secured for the loan. The defendants defaulted in repayment of the loan leaving arrears at \$140,356.33.
- [36] The defendants counterclaim the same amount as in the plaintiff's claim.
- [37] The plaintiff exercised its rights under the mortgage and sold the property for \$100,000 though they had current market valuation for \$166,000.00
- [38] The crisp issue that needs to be decided by the court is that whether the defendants owed the plaintiff the sum of \$140,356.00 on account of arrears arising out of the loan facility given by the plaintiff.

- [39] When applying for a loan facility the defendants submitted a valuation report they obtained for the property they intended to purchase. The value of the property, according to their valuation report, was \$195,000.00. The plaintiff did not obtain its own valuation of the property. It relied upon the valuation report submitted by the defendants approved the loan of \$131,000.00 with variant interest rate. After relying and acted upon the defendant's initial valuation report, it will be unconscionable for the plaintiff to turn around and to say the defendants had tendered an overvalued report. If the plaintiff were not satisfied with the valuation done by the defendants, the plaintiff might have obtained their own valuation before approving the loan.
- [40] The defendants defaulted in the repayment of the loan. As a result, their loan account eventually accumulated \$140,356.33 in arrears. The plaintiff demanded payment. Still, the defendants neglected and kept their accounts in arrears. Finally, the plaintiff opted to exercise their rights under mortgagee sale. It will be noted that the plaintiff did not exercise its rights under mortgage immediately. I should point out here that the plaintiff was delaying the mortgagee sale. The plaintiff decided to obtain vacant possession of the mortgage property from the defendants before exercising mortgagee sale. The plaintiff brought separate civil action for the recovery of possession of the property. That action was subsequently settled when the defendants agreed to give up possession of the property.
- [41] Having opted to exercise their right under mortgagee sale, the plaintiff obtained a current market valuation report at \$166,000.00. However, the plaintiff sold the property for \$100,000.00, which is far lower than the price of the property valued at the time of mortgagee sale. There is no evidence in court to show that the plaintiff embraced proper tender procedures when selling the property. The plaintiff also fails to show why the property was sold for far lower than the market valuation. In the

circumstances, it was unjust on the part of the plaintiff to sell the property at a price far lower than the market price.

- [42] I wish to cite some case authorities cited by Madam Justice Nazhat Shameem in **NBF Asset Management Bank v Niumataiwalu** [2000] FJHC 205; HBC0427J.98S (24 January 2000):

*In **Warner v. Jacob** 20 Ch. D220, Kay J said, at 224:*

“... a mortgage is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit to enable him the better to realise his debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchase the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud.”

The English Court of Appeal in **Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.** (1971) Ch. 949 held that in exercising a power of sale, a mortgagee should take reasonable care to obtain the true market value of the mortgaged property. In New Zealand however, the Privy Council in **Downsview Nominees v. First City Corp**(1993) 2 WLR 86 declined to apply the tortious duty of care test to the equity of redemption of mortgages, preferring to ask whether the mortgagee had acted in good faith. Similarly in **Parker-Tweedle v. Dunbar Bank**(1990) 3 WLR 767 the English Court of Appeal preferred the test of good faith.

In that case, Nourse LJ said:

*“It is both unnecessary and confusing for the duties owed by a mortgagee to the mortgagor and the surety, if there is one, to be expressed in terms of the tort of negligence. The authorities which were considered in the careful judgments of this court in **Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.** demonstrate that the duty owed by the mortgagee to the mortgagor was recognised by equity as arising out of the particular relationship between them....”*

In **Downsview Nominees** (supra) Lord Templeman said:

*“If a mortgagor exercises his power of sale in good faith for the purpose of protecting his security, he is not liable to the mortgagor even though he might have obtained a higher price, and even though the terms might be regarded as disadvantageous to the mortgagor. **Cuckmere Brick Co. Ltd. v. Mutual Finance** is Court of Appeal authority for the proposition that, if the mortgagee decides to sell, he must take reasonable care to obtain a proper price but is no authority for any wider proposition.”*

- [43] Returning back to the matter at hand, the plaintiff as mortgagee decided to sell the property. The above case authorities demonstrate that mortgagee has equitable duty to the mortgagor. It is that when deciding to sell the mortgage property the mortgagee must take reasonable care to obtain a proper price for the property.
- [44] The plaintiff approved loan in the sum of \$131,000.00 relying on the initial valuation of \$195,000.00, ostensibly the plaintiff obtained and acted upon. At the time of the mortgage sale, price of the property was valued at \$166,000.00. However, the property was sold at \$100,000.00. In the circumstances, it appears to me that the plaintiff had failed to take reasonable care to obtain a proper or appropriate price for the property. If the plaintiff had taken reasonable care, it could have obtained a better price to defray the outstanding balance at the defendant's loan account. I therefore dismiss the plaintiff's claim.
- [45] I now turn to the counterclaim. The counterclaim is based on the fraudulent act on the part of the plaintiff. The defendants allege that the plaintiff's officers and agents gave the offer letter and the mortgage documents to the defendants withholding information, and failing to disclose to the defendants that they did not qualify for the loan. I reject the allegation made by the defendants that the plaintiff's officers acted fraudulently as there is no evidence sufficient to establish such an allegation. The plaintiff had an opportunity to seek independent legal advice. Having obtained independent legal advice and have accepted the offer with the terms and condition stated therein, the plaintiff is not entitled to take stance that the loan was offered withholding information. I therefore dismiss the counterclaim as well.
- [46] Both parties are losing their respective claim. I would therefore order that each party will bear their own costs.

Final Orders

1. Plaintiff's claim dismissed.
2. Defendants' counterclaim also dismissed.
3. Each party is to bear their own costs.

M H Mohamed Ajmeer
5/10/16

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M H Mohamed Ajmeer

JUDGE

At Lautoka

5th October 2016

