

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 325 of 2016

BETWEEN : INTERCLEAN FIJI LIMITED a limited liability Company having its registered office at 590 Ratu Mara Road, Nabua, Suva, Fiji.

PLAINTIFF

AND : DAVID JOHN VOSS trading as BULA FIJI TOURISM EXCHANGE of 56 Grantham Road, Court, Suva.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSEL: Mr. Nandan for the Plaintiff/Applicant
No appearance of the Defendant/Respondent

Date of Hearing: 15th March, 2017

Date of Ruling: 16th March, 2017

RULING

[Application by the Plaintiff to restrain the Defendant and or/ agents, employees, officers from interfering with the Plaintiff, its agents, employees and officers from in any way whatsoever from retrieving and removing its assets from Lot 2 SO 1173, 590 Ratu Mara Road, Nabua.]

APPLICATION

1. This is the Plaintiff's Notice of Motion made pursuant to Order 8 Rule 2 of the High Court Rules of 1988 and seeks the following orders:-

- (a) To Restrain the Defendant and/or its agents, employees, officers from interfering with the Plaintiff, its agents, employees and officers in any way whatsoever from retrieving and removing its assets from Lot 2 SO 1173, 590 Ratu Mara Road, Nabua.
 - (b) Police to assist in the retrieval of the assets.
 - (c) Cost of this application to be paid by the Defendant.
 - (d) Any other order that this court deems just.
2. The Notice of Motion together with the Affidavit in Support was personally served on the Defendant on 17th January, 2017. The affidavit of service has been filed in Court to prove that the service has been effected on the Defendant.
 3. The Defendant personally sent an undated correspondence to this Court, received on 15th March, 2017 stating that he has been discussing settlement options with the Plaintiff and if a date can be assigned in the middle or end of April, 2017 to enable him engage the services of a legal representative and by then may reach settlement.
 4. The Plaintiff's Counsel was not aware of any discussion as to settlement options.
 5. The application was heard in the absence of the Defendant.

Plaintiff's Case

6. *On or about 01st July, 2014, the Plaintiff and one Compass Corporate Solutions Limited (CCSL) entered into an agreement for the Plaintiff to lease the property to the Defendant.*
7. *The registered lessee of the property is (The Trustees).*
8. *The Plaintiff was aware that the property was sub-leased to CCSL, by the Defendant who had sub-leased it from the Trustees.*
9. *The Plaintiff was unaware whether any consent was obtained from the Crown Land by any of the parties to sub-lease the property.*
10. *That pursuant to the Tenancy Agreement with CCSL, the Plaintiff continued paying the rent until April, 2015.*
11. *CCSL was wound up on 06th February, 2015.*

12. *The Defendant then requested the Plaintiff to pay rent to it and the Plaintiff obliged. Payment of rent was done from the month of May, 2015 - September, 2015. A further 2x payments were made directly to the Trustees Solicitors.*
13. *The Defendant was then given a notice to Vacate by the Trustees on 14th August, 2015, which was forwarded to the Plaintiff and the Plaintiff vacated the property on 02nd February, 2016.*
14. *The Plaintiff did not take some of his possession from the property the time of vacation.*
15. *That the Plaintiff was informed by Michelle Muller of the Plaintiff that there were other assets on the property that were released by the Defendant.*
16. *On or about 16th August 2016 the Defendant forwarded to the Plaintiffs office, an invoice claiming the sum of \$39,630.39 for storage and security fees from the month of 1st January 2016 to 15th August 2016 whilst there was no agreement between the Plaintiff and the Defendant as such.*
17. *The Defendant does not hold a lease of the Property from the Trustees as the same expired on 31st 2015.*
18. *No consent has been obtained from the Crown Land to allow for the charging of storage cost.*
19. *On or about 15th July 2016, the Defendant advertised in the Fiji Times calling for the removal of the assets from the Property. The same was to be removed after prove of ownership was given. The notice further stated that if the items were not removed within 7 days, the same would be tendered to defray storage.*
20. *On or about 13th August 2016 the Plaintiffs employee Michelle Muller attended to bring back the assets of the Plaintiff back to the Plaintiffs current premises at Lot 19, Wailada, Industrial Estate, Lami.*
21. *Michelle Muller had loaded the 20 foot container on to a truck registration number FY 933 (the truck) belonging to the Plaintiff, when the Defendant through Andrew Tinker of CCSL intervened and called the police and the police prevented the truck from leaving the property.*
22. *The truck is the Plaintiffs main income earner and the Plaintiff is suffering loss of business every day.*
23. *The Defendant does not have a right to the assets of the Plaintiff and the truck.*

24. *The Plaintiff is willing to provide a bank guarantee to Court and the Defendant to immediately release the assets and truck of the Plaintiff. The matter can go to a hearing in relation to the alleged debt of the Plaintiff to the Defendant.*
25. *The Plaintiff gives its undertaking as to damages and seeks orders in terms of the application.*

Analysis and Determination

26. *The orders sought as per the motion /application is a final Order in terms of a mandatory and a restraining order.*
27. *The principles for granting a mandatory injunction was set out in Redland Bricks Ltd -v- Morris (1969) 2 ALL ER 576-*
 - (a) *A mandatory injunction can only be granted where the plaintiff shows a very strong probability on the facts that grave damage will accrue to him in the future. It is a jurisdiction to be exercised sparingly and with caution, but in the proper case unhesitatingly.*
 - (b) *Damages will not be a sufficient or adequate remedy if such damage does happen.*
 - (c) *The cost to the defendant to do the work or the act must be taken into account.*
 - (d) *The court must be careful to see that the defendant knows exactly what he has to do.*

However, the House of Lords went onto say that every case must depend essentially on its own particular circumstances and the same applies to this very instant case.

[Emphasis mine]

28. *In a mandatory injunction case, the principles to adhere will change on the circumstance of the case.*
29. *The Plaintiff is seeking an order to Restrain the Defendant and/or its agents, employees, officers from interfering with the Plaintiff, its agents, employees and officers in any way whatsoever from retrieving and removing its assets from Lot 2 SO 1173, 590 Ratu Mara Road, Nabua and the police to assist in the retrieval of the assets.*

30. In determining this application, the test the court should follow was also laid down in American Cyanamide Co -vs- Ethican Ltd (1975) AC 396. As per the said case in granting injunctive relief, the court should consider the following: -
- i. *Whether there is a prima facie case with the probabilities of plaintiff succeeding and whether there is a serious issue to be tried.*
 - ii. *Whether the balance of convenience favours the court exercising its discretion in favour of the plaintiff.*
 - iii. *Undertaking as to damages.*

Balance of Convenience.

29. The consequence of granting the injunction especially in the nature of a mandatory and a restraining nature has been considered by this court. It is important to note that after the Court documents; including the Notice of Motion, Affidavit in Support and the Writ of Summons as the substantive matter were served, the Defendant opted not to be present or be represented in court to counter the same. Instead, the Defendant thought fit in the circumstances to write a letter to the Court, informing this Court that he is discussing settlement and will engage a legal representative and therefore sought an adjournment till the middle to the end of April, 2017.

Accordingly, in the absence of the Defendant, the application for injunction goes unopposed.

In the circumstances, with the evidence and submissions furnished to Court, I am inclined to think that the balance of convenience in this matter goes in favour of the Plaintiff.

30. In this case the Plaintiff is willing to provide a Bank guarantee to the Court and also willing to give an undertaking as to damages.
31. The evidence before this Court is that on 01st July, 2014, the Plaintiff and one Compas Corporate Solutions Limited (CCSL) entered into an agreement for the Plaintiff to lease the Property to the Defendant. The registered lessee of the property is the Trustees. The Plaintiff was unaware that the property was sub-leased to CCSL by the Defendant who had sub-leased it from the Trustees. Whether any consent of the Crown Land was obtained or not by any of the parties to sub-lease the Property is still in dark. The Plaintiff was paying rental and was subsequently served a Notice to Vacate the Property and the Plaintiff did vacate on 02nd February, 2016.
32. Assets of the Plaintiff was left on the premises and taken possession of by the Defendant who now refuses to release the same to the Plaintiff instead the Defendant is charging the storage fees to the Plaintiff who is refusing to pay any storage charges as invoiced to him.

Conclusion

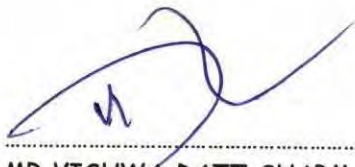
33. The balance of convenience is favouring the grant of the injunction and orders against the Defendant as sought for in his Notice of Motion.
34. In the circumstances and for the aforesaid rational the discretion of the Court is to be exercised in favour of the Notice of Motion seeking the Injunctive orders accordingly.

FINAL ORDERS

- A. An injunction restraining the Defendant and/ or its agents, employees, officers from interfering with the Plaintiff, its agents, employees and officers in any way whatsoever from retrieving and removing its assets from Lot 2 SO 1173, 590 Ratu Mara Road, Nabua;
- B. Police to assist in the retrieval of the Plaintiff's Assets;
- C. Cost of this application in the cause; and
- D. The Plaintiff to seal the Court Order and serve the same onto the Defendant forthwith.
- E. Matter to be listed for further direction on 31st March, 2017 at 9 am.

Dated at Suva this 16th day of March, 2017




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MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: Reddy & Nandan Lawyers, Suva