

THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 90 of 2012

BETWEEN : **PREMIKA SHYAM T/A MERMAIDS NITE CLUB 7 RASTA BAR** of
40 Quaia Street, Lami.

PLAINTIFF

AND : **GREMAY PACIFIC LTD** a limited liability company having its registered office
at 61 Millet Road, Vatuwaqa Industrial Subdivision, Suva in Fiji.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: No appearance by the Plaintiff
Mr. Diven Prasad for the Defendant

Date of Ruling: 10th July, 2017

JUDGMENT

[Defendant's Counter-Claim against the Plaintiff]

INTRODUCTION

1. This is the **Defendant's Counter-Claim** application against the **Plaintiff** seeking the following orders-
 - (a) That the claim by the Plaintiff be dismissed forthwith;
 - (b) Judgment against the Plaintiff as per the counter-claim in the sum of \$69,797-50;
 - (c) Interest from the date of the cause of this action;
 - (d) Costs of this action on a solicitor/client indemnity basis to be paid by the Plaintiff; and
 - (e) Such further or other relief this Honourable Court may deem just and expedient.
2. The Plaintiff filed his **Reply to the Defendant's Statement of Defence and Counter-Claim** on 12th June, 2012.
3. The Plaintiff did not appear in Court to defend the Defendant's Counter-claim and the Counter-claim was heard on an undefended basis.
4. The Court has taken into consideration the contents of the Plaintiff's Reply to the Statement of Defence and the Counter-claim.

THE LAW

5. The law dealing with counter-claim against a Plaintiff is provided for in **Order 15 of the High Court Rules, 1988** as follows-

Counterclaim against plaintiff (O.15, r.2)

2.-(1) Subject to rule 5 (2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and where he does so he must add the counterclaim to his defence.

(2) Rule 1 shall apply in relation to a counterclaim as if the counterclaim were a separate action and as if the person making the counterclaim were the plaintiff and the person against whom it is made a defendant.

(3) A counterclaim may be proceeded with notwithstanding that judgment is given for the plaintiff in the action or that the action is stayed, discontinued or dismissed.

(4) Where a defendant establishes a counterclaim against the claim of the plaintiff and there is a balance in

favour of one of the parties, the Court may give judgment for the balance, so, however, that this provision shall not be taken as affecting the Court's discretion with respect to costs.

DEFENDANT'S CASE

6. That on or about 03rd November, 2009, the Defendant and the Plaintiff entered into a tenancy agreement to rent the premises owned by the Defendant situated at Lot 13 Beddoes Circle, Waqadra, Nadi for the period between 01st April, 2010 and 30th September, 2010.
7. The Plaintiff was required to pay \$3,500 plus vat per month as rent to the Defendant.
8. That it was also agreed that as of 01st October, 2010, the rental amount payable by the Plaintiff would be increased to \$4,500 plus vat per month for the first 4 years with an option for renewal for a further 5 years subject to market review.
9. The Plaintiff took up the tenancy and began occupying the premises from April, 2010 as was agreed and continued to pay the rents until end of the first period of tenancy.
10. That, thereafter, as per the agreement the monthly rental amounts were increased, however, the Plaintiff only paid the rentals for November, 2010 while she continued to operate her business and occupy the said premises until August, 2011 without any further payments as was required.

Particulars of rental arrears

Monthly rental for December, 2010	- \$ 5,062-50
Monthly rental from January to August, 2011 (\$5,175 x 8 months)	- \$41,400-00
Less payments made	- \$ 4,100-00
Total	- <u>\$42,362-50</u>

11. That due to the defaults in meeting her monthly repayments for 9 continuous months, the Plaintiff was asked to vacate the premises. The Plaintiff eventually vacated the premises in September, 2012.

12. Particulars of damages suffered by the Defendant were assessed to be **\$11,910** as set out in the counter-claim at paragraph 22.
13. As at **August, 2011**, the Plaintiff owed a total sum of **\$54,272-50** in rental arrears and repair costs.
14. The **Defendant** was able to secure another tenant thereafter, however, after **4 months** of tenancy, the tenancy agreement had to be **terminated** due to the bad condition the premises was left in by the Plaintiff as a result of the damages caused.
15. The **Defendant** was not in a position to secure another tenant since **January, 2012** and continues to lose rental payments at **\$5,175** each month to date as follows-

Particulars of continuing rental loss

January, 2012	-	\$ 5,175
February, 2012	-	\$ 5,175
March, 2012	-	\$ 5,175
 Total	-	 <u>\$15, 525</u>

16. That as a result, the **Plaintiff** to date is indebted to the **Defendant** for the sum of **\$69,797-50** for **rental arrears, loss for damages** to the property and **loss of accumulating rentals**.
17. The Defendant further claims interest and costs from the Plaintiff.

PLAINTIFF'S REPLY TO DEFENCE & COUNTER-CLAIM

18. As to paragraphs 13, 14, 15, 16 and 17 of the Defendant's Counter-claim; the Plaintiff admits the contents alleged therein. The **tenancy agreement** was entered into on the **03rd November, 2009** with a monthly rental of \$1,000 per month. The rental was to be increased 01st April, 2010 to 30th September, 2010 to \$3,500 plus vat and thereafter further increased from 01st October, 2010 to \$4,500 plus vat for the next 4 years with an option to renew to another 5 years.

19. The Plaintiff denies paragraphs 18 and 19 and stated that rental for the months of June, July and August were paid directly to Rodney from the proceeds acquired on the bar sales and puts the Defendant to strict proof.
20. The Plaintiff denies paragraph 20 stating that she only surrendered vacant possession of the property as its business had been advertised in the local dailies to be sold by the Defendant without its knowledge.
21. In terms of paragraph 23, the Plaintiff reiterates that they have invested substantially on the improvements prior to their operations.
22. In terms of paragraph 24 of the Defence and counter-claim, the Plaintiff reiterates that it has redeemed majority of the rentals as they have been personally collected by Rodney from the bar sales apart from the payments that have been issued. The recourse for the Defendant ought to have been to proceed with the levy for distress on the items of the Plaintiff rather than pleading the same as a counter-claim in these proceedings.
23. The Plaintiff states that she was never served with any statutory demand or in any way informed of the outstanding rentals.
24. Paragraph 26 of the counter-claim is denied by the Plaintiff and states that prior to possession by the Plaintiff, the property was vacant for a very long time because of its deteriorating conditions. The Plaintiff had to invest substantially to improve the same including the reconstruction of the interior of the building and install items inside. This has been admitted by the Defendant as alleged in paragraph 7 of its own statement of defence.
25. Paragraph 27 is denied and the Plaintiff reiterates that although they have been forced to surrender vacant possession of the property by the Defendant and as the case may have been, they continued to claim rental within those periods. This is absurd to say the least and is an abuse of the entire court process to claim for rentals when tenancy has been surrendered.

ANALYSIS and DETERMINATION

26. The Defendant is not pursuing his claim with regards to the particulars of **damage** sustained on his property by the Plaintiff in terms of paragraph 23 of its Statement of Defence and the Counter-Claim. That is the Defendant is withdrawing his counter-claim in the sum of **\$11,910** from the total claim of

- \$69,797-50. Therefore, the Defendant is now seeking the Plaintiff to pay a balance sum of \$ 57,887-50.
27. The **issue left** for this court to determine now is the **Quantum of rental arrears** the **Defendant** is entitled to together with any **interests and costs**?
 28. The Plaintiff nor her Counsel appeared in Court to defend the **Defendant's Counter Claim** when it proceed to hearing on 22nd September, 2016.
 29. The **Defendant** called one witness Rodney Roy Chand who gave evidence under oath in his capacity as the Company Director of the Defendant Company, Greymay Pacific Ltd. In summary his evidence was as follows-
 - *He tendered a list of exhibits in terms of the Crown Lease, Lease Agreement, Invoice dated December, 2010, Statement for the Rental owed and the Demand notice;*
 - *He will not claim \$11,910 for damages sustained as per paragraph 23 of the counter-claim but will proceed with remaining claim of \$57,887-50;*
 - *He claims rental from 1/4/2010-30/9/2010 in the sum of \$3,500 a month plus vat;*
 - *He claims rental for December, 2010 as per exhibit 5728 at p9 in the sum of \$5062-50;*
 - *He tendered Document marked 4 at p 10 showing unpaid rental at \$3937-50 from 1/4/2010-1/10/2010 (\$27,562-50) and from 1/11/2010- August, 2011 at \$5175 per month (10 x \$5175 = \$51,750) and total sum now due is \$42,462-50 after given a discount for overdue rental for \$4100.*
 30. The Lease Agreement executed on 03rd November, 2009 confirms at paragraph 2 that from 01st April, 2010 to 30th September, 2010, the rent would be \$3500 + vat per month.
 31. It was also agreed upon that from 01st October, 2010 the rent should be fixed at \$4,500 + vat per month for an initial period of 4 years with option for renewal for a further 5 years.
 32. Now, referring to the Document marked Exhibit 'DE 4' at page 10, it shows a breakdown of the monthly rental received and the rental which remains unpaid. From the month of April 2010, up to November, 2010, it confirms that the rental was already paid as per the dates reflected in the column "Received Date". According to this particular Exhibit, no rental is due from the **Month April, 2010 to the Month of November, 2010.**

33. According to the witness Rodney Roy Chand's evidence, he whilst referring Court to this Exhibit DE 4 stated that at page 10, *'it shows unpaid rental at \$3937-50 from 01st April, 2010 to 01st October, 2010 a total of \$27,562-50 and from 01st November, 2010 to August, 2011 at \$5,175 per month for 10 months x \$5,175 a total of \$51,750, therefore the total sum now due is \$42,462-50 after giving a discount of \$4,100.*
34. The correct inference this Court can now draw from this particular documentary exhibit at page 10 is that the Plaintiff owed the monthly rental from January, 2011 to August, 2011 at \$5,175 totalling \$ 41,400 plus rental for the month of December, 2010 at \$5,062-50 totalling to \$ 46,462-50. Further, \$4,100 was received by the Defendant and accounted for from the total arrears of \$46,462-50. The Total arrears now stood at **\$42,362-50**.
35. **The Defendant** stated in his **Statement of Defence** at paragraph 18 that he was claiming rental arrears of **\$42,362-50** which is in conformity with the evidence given by the witness.
36. However, at paragraph 20, 26 and 27 of the **Statement of the Defence**, the **Defendant** stated that **the Plaintiff** eventually **vacated** the premises in **September, 2012**, and the Defendant was unable to secure another tenant since **January, 2012** and continued to lose rental payment of \$5,175 each month to the date of the filing of the Defence and therefore claims a total sum of **\$15,525** for the period **January, 2012 to March, 2012** inclusive.
37. The **Plaintiff** in her **Reply** to the Defendant's Statement of Defence denied paragraph 27 and stated 'that the Plaintiff reiterates that although they have been forced to surrender vacant possession of the property by the Defendant, and as the case may have been, they continued to claim rental within those periods. This is absurd to say the least and is an abuse of the entire court process to claim for rental when tenancy has been surrendered.'
- It should be noted that although the Plaintiff has failed to appear to counter the Defendant's Claim, this court cannot disregard the Plaintiff's pleadings filed herein rather must take into consideration what has been pleaded before making a final decision. The Defendant did not raise any issues or counter what was stated in the Plaintiff's Affidavit in Reply at paragraph 27.
38. The **Demand Notice** addressed to the Plaintiff dated 02nd November, 2011 claims total rental arrears of **\$42,362-50** as at 31st August, 2011 which is in conformity with Exhibit 'DE 4' at page 10 tendered to Court.

39. Therefore, the **Defendant** should not be claiming any principal amount in excess of **\$43,362**, as the amount reflected in the Demand Notice and not to claim for what he has failed to claim for. This Court will not accede to the **Defendant's** claim for rental arrears of **\$15,525** for the period January, 2012 to March, 2012.
40. After a careful consideration of the Defendant's evidence before this Court and upon the perusal of the pleadings filed herein, This Court will accede to the **Defendant's** claim of rental arrears totalling to **\$42,362** together with **costs summarily** assessed at **\$500**. There will be no order for any interest at the discretion of this Court.
41. For the aforesaid rational, I proceed to make the following Final Orders.

ORDERS

- a. **Judgement for the Defendant on his Counter Claim against the Plaintiff in the total sum of \$42,362-50 accordingly;**
- b. **Costs summarily assessed against the Plaintiff in the sum of \$500 to be paid within 28 days.**
- c. **There will be no orders made as to interest at the discretion of this Court.**
- d. **Orders accordingly.**

DATED AT SUVA 10TH DAY OF JULY, 2017



.....
VISHWA DATT SHARMA
Master of High Court, Suva

cc.: *Diven Prasad Lawyers, Lawyers, Suva*
Premika Shyam t/a Mermaids Nite club & Rasta Bar, Suva