

**IN THE HIGH COURT OF FIJI AT LABASA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 59 of 2014**

**BETWEEN**

**MUNESH PRASAD** (f/n Kamla Prasad), Businessman of Nacekoro, Savusavu.

**PLAINTIFF**

**AND**

**NBF ASSET MANAGEMENT BANK**, a financial institution, Level 3,  
Reserve Bank of Fiji Building, Pratt Street, Suva.

**DEFENDANT**

Counsel : Mr. Isereli Romanu for Plaintiff  
Mr. Karl Jamnadas for Defendant

Date of Hearing : 03<sup>rd</sup> July, 2017

Date of Judgment : 14<sup>th</sup> August, 2017

## JUDGMENT

- [1] The defendant advertised in the newspaper "Fiji Sun" for the sale of the land described in Certificate of Title No. 21229, Lot 1 on Deposit Plan 5321 "Nacekoro" in the town of Savusavu having an area of 1.8976 hectares.
- [2] The plaintiff submitted his tender in writing to purchase the said property for FJD96000.00 which was conditionally accepted by the defendant. The defendant on 20<sup>th</sup> August, 2012 withdrew from the mortgage sale of the property and the plaintiff instituted these proceedings claiming damages from the defendant. The plaintiff claimed special damages, general damages, exemplary damages, specific performance of the contract, costs on indemnity basis and interest at the rate of 7% per annum.
- [3] The defendant through its solicitors accepted the offer of the plaintiff by their letter dated 02<sup>nd</sup> August, 2005 (P3), subject to the following conditions:
- (i) The sale is on "as is where is basis" and subject to all statutory consents.
  - (ii) No vacant possession i.e. eviction of the owner, tenant or any squatters remain your responsibility.
  - (iii) Execution of a sale and purchase agreement with terms thereof as approved by the Bank to be prepared by the Bank's Solicitors
  - (iv) Transfer documents to be prepared by us as Bank's Solicitors.
  - (v) Finance - you are required to pay 10% deposit on execution of the sale and purchase agreement.
  - (vi) The Bank reserves the right to withdraw this offer at any time to protect the Mortgagor's right of redemption.
  - (vii) Should you fail to execute the sale contract following the acceptance hereof the tender deposit will be forfeited.
  - (viii) VAT if applicable will be purchaser's care.
  - (ix) Payment of any outstanding rates and utilities will be your care.
  - (x) Notwithstanding the acceptance of any offer, the Mortgagee shall have the absolute rights for any cause or reason whatsoever which the Mortgagee may consider proper, at any time before the date of settlement of cancelling and/or withdrawing from the sale. In any such event the Mortgagee and the parties agree that any such cancellation and/or

withdrawal shall not give rise to or entitle either party to commence or institute any action, suit or proceedings in any court against the other party and each party shall release the other from all other actions, proceedings, claims and demands for or on account of the within agreement.

- (xi) Purchaser will need to provide the Bank with the confirmation / approval letter from financier within fourteen days after acceptance of this offer and FNPF if applicable of the above property before the Bank proceeds with preparation of legal documentation by Bank's Solicitors.

[4] From the content of the letter dated 20<sup>th</sup> August, 2012 (P9) it appears that the defendant withdrew from the mortgagee sale for the following reasons:

- (a) The plaintiff had been declared bankrupt.  
(b) The plaintiff has failed to pay the 10% deposit within a reasonable time in that he has taken seven years to pay the deposit.  
(c) There were three Civil Actions pending against the plaintiff (Civil Action No. 1 of 2012, Civil Action No. 35 of 2002 and Civil Action No. 2 of 2007).

[5] In his evidence the witness for the defendant stated that failure on the part of the plaintiff to provide a financier as required by clause (xi) of the letter "P9" was also a ground for the defendant to withdraw from the mortgagee sale.

[6] Statement of the Trust Account of the defendant maintained by its solicitors was tendered in evidence marked as "P5", according to which the plaintiff has made the following payments:

(Date is not clear)	\$100.00
On 28-09-2005	\$500.00
On 24-07-2007	\$4000.00
On 13-09-2007	\$1000.00
On 16-02-2012	\$4000.00

[7] By letter dated 24<sup>th</sup> November, 2011 the solicitors of the defendant informed the plaintiff that he was given seven days to pay the balance of the initial deposit of 10%



of the purchase price and on his failure the transaction would be cancelled and the amount already paid would be refunded. However, the plaintiff had failed to pay the balance of the deposit within the time prescribed by the said letter. The defendant denied having given a further extension of time to the plaintiff and there is no evidence acceptable to this court that any such extension of time was granted to the plaintiff.

- [8] It is borne out by the document marked "D1" that the Magistrate's Court has declared the plaintiff bankrupt and has appointed a receiver. This fact was not denied or challenged by the plaintiff.
- [9] It is the evidence of the plaintiff that his sister who lives in the USA was prepared to finance this transaction and he took her to the office of the defendant's solicitor. Assuming that the plaintiff in fact took her to the solicitor's office, the terms of awarding the tender to the plaintiff does not require him to take the financier to the office of the solicitor or to the defendant's office. What it requires is that the plaintiff must tender a letter of approval from the financier. If his financier was his own sister the plaintiff could not have had any difficulty in obtaining a letter and giving it to the defendant. Therefore, the court will not accept the evidence of the plaintiff that he in fact had a financier.
- [10] The plaintiff testified that he paid the defendant's solicitor \$19,500.00 but he does not have receipts because when he was ousted he lost all the receipts. All the payments made to the defendant's solicitor are reflected in the statement "P5", according to which he has only paid \$9,600.00 for the period of seven years commencing from 2005.
- [11] The learned counsel for the defendant confronted the plaintiff with the averments contained in his affidavit verifying list of documents. The attention of the especially drawn to paragraph 3 of the affidavit which reads as follows;
- THAT the plaintiff had, but not now, in his possession, custody or power the documents relating to the matters in this action enumerated in schedule 2 hereto.
- [12] Schedule 2 of the said affidavit does not contain any information or a list of documents. The plaintiff could not explain why he did not include a list of receipts

he had in his possession but later lost in schedule 2 to the affidavit verifying list of documents.

- [13] It is a fact that is not in dispute that there was no sale and purchase agreement between the plaintiff and the defendant. Therefore, the plaintiff cannot in law claim for specific performance. It is also pertinent to note that specific performance is not a remedy that can be sought as of a right it is only an alternative remedy granted where the damages for breach of contract is not a sufficient remedy.
- [14] From the evidence adduced in this case it is clear that the offer was withdrawn by the defendant due to the failure on the part of the plaintiff to satisfy its terms. Therefore, it cannot be said that a cause of action had accrued to the plaintiff to sue the defendant for breach of contract. On that ground the claim of the plaintiff for damages for breach of contract must fail.
- [15] The plaintiff alleges that the defendant had been negligent. I see no basis for this allegation. There is no negligence on the part of the defendant. It has, with reasons, withdrawn from the mortgagee sale. It is the plaintiff who is at fault. Before complaining against the defendant the plaintiff should have complied with his part of the bargain.
- [16] There are several fundamental differences between law of contract and tort law. One of the most important differences is the issue of consent. In a contract, the parties must enter into the agreement knowingly and without being coerced. In order for the contract to be valid, each party must consent to the outcome of the contract as stated in the document. This means that one party cannot force the other to enter into the contract without their consent. Therefore, damages in a contract claim usually have to do with a mistake or a misunderstanding between the parties, since they are typically aware of what they are dealing with in the contract. On the other hand, the interaction in a tort is never based on consent. Torts generally involve an intrusion by one party into the safety, health, profit, or privacy of the victim. In fact, if the victim consents to the tortious conduct, it can serve as a defence that will prevent them from recovering damages. This difference with regards to consent is reflected in the way that courts award damages. For contracts, the purpose of a damages award is to restore the parties to their position before the breach occurred. In a torts claim, the damages are usually awarded to compensate the victim for their loss. Punitive



damages are sometimes awarded in a tort suit in order to punish the defendant. Punitive damages are rarely issued in a contracts claim.


[17] The plaintiff has in this action joined two different causes of action that is damages for negligence and specific performance of a contract. The negligence is a conduct that falls below the standards of behaviour established by law for the protection of others against unreasonable risk of harm. A person has acted negligently if he or she has departed from the conduct expected of a reasonably prudent person acting under similar circumstances. For the court to hold someone liable in damages for causing harm by a negligent act it must be satisfied that such person owed a duty of care towards the person suffered injuries. The duty of care means an obligation to take responsible care to avoid injury to a person whom, it can be reasonably foreseen, might be injured by an act or omission. In this matter the defendant did not owe any duty of care to the plaintiff. Therefore, the claim of the plaintiff for damages based on the negligence of the defendant must necessarily fail.

[18] For the reasons stated above the court makes the following orders.

#### ORDERS

1. The writ of summons is struck out and the plaintiff's action is dismissed.
2. The plaintiff is order to pay the defendant \$2000.00 as costs (summarily assessed) of this action.



  
Lyone Seneviratne  
JUDGE

14<sup>th</sup> August, 2017