

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 89 of 2013

BETWEEN

CREDIT CORPORATION (FIJI) LIMITED a limited liability company
having its office at Credit House, 10 Gorrie Street, Suva.

PLAINTIFF

AND

MOHAMMED IMRAN QAMER of Lot 34A, Kabi Place, Nakasi,
Businessman.

DEFENDANT

Counsel : Mr. V. Filipe for the Plaintiff
Mr. I. Romanu for the Defendant

Date of Hearing : 17th April, 2018

Date of Judgment : 31st May, 2018

JUDGMENT

[1] By its amended statement of claim the plaintiff sought the following reliefs against the defendant:

- (a) Judgment in the sum of \$224,475.03
- (b) Pre-judgment interest 10% per annum from 26th January 2016 to the date of judgment pursuant to section 3 of the Law Reforms (Miscellaneous Provisions)(Death and Interest) Act 1935.
- (c) Post judgment interest 4% per annum from the date of judgment to the date of full payment pursuant to section 4 of the Law Reforms (Miscellaneous Provisions)(Death and Interest) Act 1935.
- (d) Indemnity costs.

[2] At the pre-trial conference the parties admitted the following facts:

1. The plaintiff is a duly registered company having its office at Credit House, 10 Gorrie Street, Suva and carrying on business there and elsewhere in Fiji as a financier.
2. The defendant is a businessman and a customer of the plaintiff.
3. The defendant had two loan accounts with the plaintiff being Account Nos. 177683 and 182485.
4. On or about 28th November 2011, Loan Account Nos. 177683 and 182485 were re-written to Loan Account No. 312381 ("Loan") at the request of the defendant.
5. The Loan was secured - following a variation - on or about 16th February, 2012 - by way of:
 - (a) First Registered Mortgage ("Mortgage") over the plaintiff's instrument of over the plaintiff's Instrument of Tenancy Contract No. NLTBG/50039598 known as Mataikalubu in the province of Naitasiri having an area approximately 11.2571 hectares (27 acres 3 roods 10 perches) ("Property").
 - (b) Bill of sale over motor vehicle registration numbers CY 361, DF 079 and EC 222 ("Bill of Sale").

6. The Bill of Sale contains certain terms and conditions including the condition that the Defendant would pay the Plaintiff *inter alia* 60 monthly instalments of \$4033.28.
7. Under the Bill of Sale, motor vehicle registration numbers CY 361, DF 079 and EC 222 (collectively the "Vehicles") belong to the plaintiff. Therefore the defendant was granted conditional possession and the use of the vehicles.
8. The plaintiff has repossessed and sold motor vehicle registration numbers CY 361 (\$13,000) and EC 222 (\$3000).

[3] This matter was fixed for trial on 16th and 17th April, 2018. On 16th April, 2018 when the matter was taken up for trial the Mr. Filipe, the counsel for the plaintiff moved that the matter be adjourned for 17th April, 2018 since the only witness for the plaintiff was attending a family funeral in the west. Mr. Romanu, the counsel for the defendant objected to the application and submitted that the defendant is ready to proceed with the trial. However, taking into consideration the difficulty of the plaintiff and the fact that there were only two witnesses to testify the court adjourned the trial for 17th April, 2018. On 17th April, 2018 the plaintiff called its only witness and closed its case. When the court inquired from the learned counsel for the defendant whether he would call any witnesses he informed court that the defendant is in China on a business tour and sought an adjournment. This fact should have been brought to notice of the court before the hearing was commenced. When the matter was taken up on 16th morning his submission was that the defendant was ready for the hearing indicating that the defendant was available to testify. For this reason the court refused the application of the defendant for an adjournment and then the learned counsel informed that he closes the defendant's case without adducing any evidence.

[4] At the conclusion of the trial both parties were granted time till 08th May, 2018 to file their respective submissions and only the defendant's counsel filed submissions.

[5] According to the amended statement of claim the plaintiff claims the following amounts of money:

Principle Sum advanced to the defendant	\$ 151,248.00
Interest	\$ 90,748.80

Administration Charges	\$ 21,828.23
Less: Payments made	\$ 23,350.00
Less: Sale Proceeds (EC 222)	\$ 3000.00
Less: Sale Proceeds (CY 361)	\$ 13,000.00
Total Amount Due	<u>\$224,475.03</u>

[6] The defendant has not denied that he obtained a loan and that he failed to repay the loan as agreed. The witness for the plaintiff gave evidence and explained how the entire transaction was processed and the manner in which the plaintiff recovered part of the loan. The plaintiff tendered as many as forty documents (P1 to P40) in support of its claim. None of these documents or the evidence of the witness were challenged by the defendant. The learned counsel for the defendant raised two questions in cross-examination. They are:

- (1) has the plaintiff proved the payments made to the Solicitors as stated in the statement of account (P12); and
- (2) whether the plaintiff is entitled to institute and maintain this action while still having a property as security for the loan.

[7] I will deal with these two questions in detail later in the judgment.

[8] The defendant in his statement of defence averred that these proceedings are abuse of the process of the court since the court has already dealt with the matter. The substantive matter has not been dealt with by the court before. On 02nd April, 2013 the plaintiff filed an ex-parte summons seeking order to repossess the vehicle bearing registration No. DF 079 which was included in the Bill of Sale and when the defendant failed or neglected to comply with the orders the court fined him \$10,000.00. In any of these matters the substantive rights of the parties have not been adjudicated upon.

[9] The plaintiff tendered in evidence marked as "P12" the statement of account where it is stated that \$9718.84 has been paid to Haniff Tuitoga Lawyers which is part of the claim made against the defendant but no payment receipts or any other evidence have been tendered in evidence by the plaintiff to establish that such a payment was due to the solicitors and it was in fact paid to them and no reason was given for not

tendering the receipts in evidence. Therefore, the court has to conclude that the plaintiff has failed to establish that it in fact paid this amount to the solicitors.

[10] The second issue raised by the defendant is whether there was a cause of action accrued to the plaintiff to sue the defendant for the amount claimed in the writ of summons. The plaintiff is still holding a property of the defendant by way of a mortgage, as security for the loan granted to him. It is the evidence of the plaintiff's witness that they advertised the property for sale three times and the last advertisement was in the year 2013. The witness testified further that the market value of the property mortgaged in 2010 was \$180,000.00 and the value of the property would have now appreciated. The witness in answer to a question asked by the counsel for the defendant said that once the judgment sum is settled by the defendant the property will be released to him.

[11] The plaintiff cannot hold the mortgaged property as security for the judgment sum which the court is yet to decide on. The court is of the view that before instituting these proceedings to recover the amount stated in the statement of claim the plaintiff should have had recourse to a mortgagee sale and thereafter filed this action for the balance amount if any. For the above reasons the court holds that the no cause of action has accrued to the plaintiff to sue the defendant for the amount claimed in the statement of claim.

[12] The learned counsel the decision in the **Credit Corporation (Fiji) Ltd v Buksh** [2010] FJHC 137; HBC003.2010 where it was held;

The mortgage continues as a security as it has not been discharged as yet and as such the parties are bound by the terms of the mortgage. Clause 14 of the mortgage states that:-

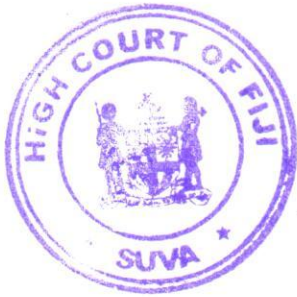
"That these presents shall be a continuing security notwithstanding any settlement of account intervening payment or other matter or thing and shall remain in full force and extend to cover all or any sums of money which may hereafter become owing by the Mortgagor to the mortgagee until a discharge hereof shall have been given by the Mortgagee to the Mortgagor."

[13] The above decision has no relevance to the matter before this court for the reason that, as I have already stated above before coming to court the plaintiff must


ascertain the amount they are entitled to recover from the defendant which the plaintiff has failed to do in this matter.

[12] Orders of the Court:

1. The action of the plaintiff is dismissed.
2. The plaintiff is ordered to pay \$5000.00 as costs (summarily assessed) to the defendant.



31st May, 2018


Lyone Seneviratne

JUDGE