

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 221 of 2015

BETWEEN: **CORE TECHNOLOGIES LIMITED** a limited liability company having its registered office at 32 Princess Road, Suva.

PLAINTIFF

AND: **NASINU TOWN COUNCIL** a duly corporate Consultant under the Local Government Act Cap 125 of Nasinu.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSEL: Mr. Huare - for the Plaintiff
 Mr. Tinivata S - for the Defendant

DATE OF RULING: 24th July, 2018 @ 9am

RULING

(Application by the Plaintiff for Summary Judgment pursuant to Order 14 Rules 1, and Order 86 Rule 1 (c) of the High Court Rules 1988 and the Inherent Jurisdiction of this Honourable Court.)

INTRODUCTION

1. The Plaintiff filed a Summons on 06th August, 2015 and sought for the following orders-
 - (i) That Summary Judgment be entered against the Defendant herein in the sum of \$143,774.96 together with interest therein at the rate of 5% per annum from year 2008 until full payment and costs of this action.
2. The application is made pursuant to *Order 14 Rules 1 and Order 86 Rule 1(c) of the High Court Rules, 1988 and the Inherent Jurisdiction of this Honourable Court.*
3. The Defendant opposed the application and relied on the affidavit evidence and the written submissions. The Plaintiff as well filed his written submissions and the application was argued by both parties to the proceedings.

Plaintiff's Case

4. According to the Plaintiff's statement of claim, on or about 2008, the Plaintiff entered into a Sale & Purchase Agreement with the Defendant for the purchase of DP 7928 on Lot 7. The Plaintiff made the payment towards the said Lot 7 and as a result the Defendant withheld the sum of \$89,859.38 towards the said Agreement and which the Defendant acknowledged and admitted in his letter of 21st January, 2008. The Defendant delayed the payment till to-date of filing the statement of claim, Hence the Plaintiff imposed 10% interest against the Defendant for withholding the sum of \$89,859.38 for the past 6 years which is in the sum of \$53,915.58. Hence the total claim in the sum of \$143,774.96 made herein. The Plaintiff seeks an order on Summary Judgment Summons. The Plaintiff relies on the Affidavit in Support and the written submissions for an order accordingly.

Defendant's Case

5. The Defendant denies the claim and stated that 2008 Sale & Purchase Agreement is not a Sale & Purchase Agreement but rather a 2007 Memorandum of Agreement relating to Construction work which was signed 8 years ago. Letter dated 21st January, 2008 is self-explanatory and that it was a proposal to settlement of purchase price that required the response of the Plaintiff but not a receipt of payment. Seeks an order to strike out the Summary Judgment application of the Plaintiff. He relies on his written submissions and the affidavit filed herein accordingly.

THE LAW

6. Order 14 of the High Court Rules, 1988 deals with Summary Judgment applications which states-

1. -(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant

has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

(2) Subject to paragraph (3), this rule applies to every action begun by writ other than-

(a) an action which includes a claim by the plaintiff for libel, slander, malicious prosecution or false imprisonment,

(b) an action which includes a claim by the plaintiff based on an allegation of fraud.

(3) This Order shall not apply to an action to which Order 86 applies.

7. Order 86 Rule 1 of the High Court Rules, 1988 provides as follows-

Application by plaintiff for summary judgment (O.86, r.1)

1.-(1) In any action begun by writ indorsed with a claim -

(a) for specific performance of an agreement (whether in writing or not) for the sale, purchase, exchange, mortgage or charge of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages, or

(b) for rescission of such an agreement, or

(c) for the forfeiture or return of any deposit made under such an agreement, the plaintiff may, on the ground that the defendant has no defence to the action, apply to the Court for judgment.

ANALYSIS and DETERMINATION

8. On 06th August, 2015, the Plaintiff filed a **Summons seeking for Summary Judgment**.
9. According to the principles of **summary judgment**, the Defendant is required to file an **affidavit that deals specifically with the Plaintiff's claim and state clearly the defence and facts** it relies upon to support it. If there is **no affidavit** filed at least the **Statement of Defence** must clearly set out the **Defence**.

In *Coral Surf Resort Ltd v Yam Civil Action No. 66 of 2008*, Master Tuilevuka (as he was then) stated as follows-

'Once a claim is established, the evidential and persuasive burden shifts to the Defendant (see Thomas J in Hibiscus Shopping Town Pty Ltd v Woolworths Ltd [1993] FLR 106 at 109) who must adduce affidavit claim and affidavit and also state clearly and precisely what the defence is and what facts he relies on to resist the entry of summary judgment: Magan Lal Brothers Ltd v L.B. Masters & Company Civil Appeal No. 31/84.'

10. The defendant resisting the summary judgment must establish that there is an issue or question in dispute with respect to the claim or the part of the claim which ought to be tried or there ought for some reasons to be a trial of that claim or part. If the defendant fails to do so, then the court will enter summary judgment against the defendant on that claim or part pursuant to *Ord. 14, r.3* of the *HCR. 1988*.
11. Pursuant to *Ord. 14, r. 1 (1) of the HCR, 1988, where in an action to which this applies, a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or particular part of such a claim, apply to the court for summary judgment against that defendant.*
12. *Further, pursuant to Ord. 14, r.1 (2), subject to paragraph (3), this rule applies to every action begun by Writ other than an action which includes a claim by the Plaintiff for libel, slander, malicious prosecution or false imprisonment, and an action which includes a claim by the Plaintiff based on an allegation of fraud.*
Sub paragraph (3) stipulates that this order shall not apply to an action to which Order 86 applies.
13. Bearing in mind the above provisions of the law, it is therefore important that I must decide whether summary judgment is available to the plaintiff in this case with regards to the nature of the claim.
14. In this case, the writ of summons was served and the defendant has filed an acknowledgement of service giving notice of intention to defend the action. Thereafter, the Defendant was required to file and serve a Defence, which he to date has failed to do so. The plaintiff therefore is entitled, pursuant to *Ord.14*, to apply for summary judgment against the defendant. Further, the filing of a statement of defence before an application for summary judgment does not preclude an application being made, nor does it prevent summary judgment being granted if the court is of the view that there is no defence to the claim.
15. Subsequent to the filing of the Defendant's Notice of Intention to Defend, the Plaintiff thought fit and proper to file and serve a Summons and seek an order for Summary Judgment instead.
16. The Fiji Court Appeal in *Carpenters Fiji Ltd v Joes Farm Produce Ltd [2006] FJCA 60; ABU 0019U of 2006S (10 November 2006)*, Case dealing with summary judgment application, laid down the well-established principles in relation to the entry of summary judgment under paragraph 21 as follows:

(a) "The purpose of O.14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up, a bona fide defence or raise an issue against the claim which ought to be tried.

(b) The defendant may show cause against a plaintiff's claim on the merits e.g. that he has a good defence to the claim on the merits or there is a dispute as to the facts which ought to be tried or there is a difficult point of law involved.

(c) It is generally incumbent on a defendant resisting summary judgment, to file an affidavit which deals specifically with the plaintiff's claim and affidavit and states clearly and precisely what the defence is and what facts are relied on to support it

(d) Set off, which is a monetary cross claim for a debt due from the plaintiff, is a defence. A defendant is entitled to unconditional leave to defend up to the amount of the set off claimed. If there is a set off at all, each claim goes against the other and either extinguishes or reduces it Hanak v Green (1958) 2 QB 9 at page 29 per Sellers LJ.

(e) Likewise where a defendant sets up a bona fide counter claim arising out of the same subject matter of the action, and connected with the grounds of defence, the order should not be for judgment on the claim subject to a stay of execution pending the trial of the counter claim but should be for unconditional leave to defend even if the defendant admits whole or part of the claim. Morgan and Son Ltd - v - Martin Johnson Co (1949) 1 K 107(CA).

See 1991 The Supreme Practice Vol 1 especially at pages 146, 147, 152 and 322."

17. Reference is also made to the *Halsbury's Law of England (4th Ed) Volume 37 para 413-415, which states as follows-*

413: Defendant showing cause:

Where the Plaintiffs application for summary judgment under Order 14 is presented in proper form and order, the burden shifts to the defendant, and it is for him to satisfy the court and there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial. Unless the defendant does so, the court may give such judgment for the plaintiff against the defendant as may be just having regard to the nature of the remedy or relief claims.

The defendant may show cause by affidavit or otherwise to the satisfaction of the court. He must "condescend upon particular", and, in all cases, sufficient facts and particulars must be given to show that there is a genuine defence. The defendant must serve his affidavit on the plaintiff or his solicitor at least three days before the return day. The affidavit may contain matters of hearsay provided the sources of information and grounds of belief are disclosed. The court has power to order a defendant showing cause or an officer of a body corporate to produce any document, and to attend and be examined on oath if there are special circumstances making it desirable to do so. By necessary implication, the obligation on the defendant to show cause allows the plaintiff to answer the defendant's case.

414: Unconditional leave to defend:

The power to give summary judgment under Order 14 is intended to apply only in clear cases, where there is no reasonable doubt that the plaintiff is entitled to judgment and where it is entitled to judgment and where it is inexpedient to allow a defendant to defend for mere purposes to delay. Leave to defend will therefore be given where the defendant shows that he has a fair case, that there is an issue or question which ought to be tried, or that there are reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence.

However, the defendant does not have to show a complete defence, but only a fair probability of a defence, or that there is a real substantial issue or question to be tried, or that there is a dispute as to facts or law which raises a reasonable doubt whether the plaintiff is entitled to judgment. The procedure under order 14 was not intended to shut out a defendant who could show that there was an issue or question that ought to be tried or that for some other reason there ought to be a trial.

Leave to defend will be given where the amount recoverable to be clearly subject to a reasonable inquiry or to an account being taken.

415: Conditional leave to defend:

The court may give a defendant against whom an application for summary judgment is made under Order 14 leave to defend the action with respect to the claim, or the part of the claim, to which the application relates either unconditionally or conditionally, that is, on such terms as to giving security or time or mode of trial or otherwise as the court thinks fit. Conditional leave to defend will be granted where the court forms the view, on the material before it, that the defence set up is a sham defence or it is shadowy, or that there is little or no substance in it or that there is something suspicious in the defendant's mode of presenting his case or the master is very nearly prepared to give judgment for the plaintiff. However, if there is no sign of bad faith nor anything to show that the defence is a sham nor any suspicious circumstances as to the mode of presenting the case, leave to defend should not be conditional, nor should it be conditional where the practical result would be likely to deprive the defendant unjustly to his defence. The usual form of conditional leave to defend requires the payment of the whole or part of the claim into court.

18. Reference is also made to the case of *Metal works & Joinery Limited v Fiji Islands Revenue & Customs Authority*, Justice Pathik applying the Court of Appeal decision delivered by Greig J in *Australia Guarantee Corporation (NZ) Ltd-v- Mc Beth [1992] 3 NZLR 54 at 58* held in determining the issue before him on the facts and circumstances of this case:-

The summary judgment procedure is a simple expeditious way to enable a plaintiff to obtain judgment where there is no real defence to the claim made see Pemberton v Chappell [1987] 1 NZLR 1 at 2. The essence of the procedure is the plaintiffs own verification by affidavit of his own statement of claim and the allegation made in it: Harry Smith Car Sales Ltd v Clay com Vegetable Supply Co Pty Ltd [1978] 29 ACTR 21. There has to be balancing between the right of the defendant to have his day in court and to have his proper defences explored and the appropriate robust and realistic approach called for by the particular facts of the case: see Bilby Dimock Corporation Ltd v Patel [1987] 1 PRNZ 84 and Cegami Investment Ltd v AMP Financial Corporation [NZ] [1990] 2 NZLR 308 at p. 313. Although the onus is upon the plaintiff there is

upon the defendant a need to provide some evidential foundation for the defences which are raised. If not the plaintiff's verification stands unchallenged and ought to be accepted unless it is patently wrong.'

19. The Plaintiff's application for summary judgment under Order 14 is presented to court in proper form and order. The burden now shifts to the **defendant**, and it is for him to satisfy the court and there is an **issue or question in dispute which ought to be tried** or that there ought for some other reason to be a trial.
20. It is not in **dispute** that there is no **Statement of Defence** filed by the **Defendant**. However, the **Defendant** has resisted to the Plaintiff's Summary Judgment Summons. The **Defendant** has filed an affidavit dealing specifically with the plaintiff's statement of claim filed herein.
21. In his Affidavit in Opposition to the Summary Judgment Summons, he states clearly and precisely what the defence is and what facts are relied on to support it. He stated that "**he denies the claim and stated that 2008 Sale & Purchase Agreement is not a Sale & Purchase Agreement but rather a 2007 Memorandum of Agreement relating to Construction work which was signed 8 years ago. Letter dated 21st January, 2008 is self-explanatory and that it was a proposal to settlement of purchase price that required the response of the Plaintiff but not a receipt of payment. He sought for an order to strike the Plaintiff's Summons.**"
22. It is clear from the **Defendant's Affidavit in Opposition** and the **documents** filed as annexures within his Affidavit that the **Defendant** has established that there are **questions in dispute and triable issues** which ought to be tried and determined at a hearing rather than via summary application.
23. The **central issues** that comes between the Plaintiff and the Defendant are the issue of the **2008 Sale & Purchase Agreement** entered between the parties, for the **Defendant** as the **registered proprietor to transfer the land comprised in DP 7928 on Lot 7 to the Plaintiff in the consideration sum of \$179, 718-15 AND** whether the **2008 Sale & Purchase Agreement** was not a **Sale & Purchase Agreement** but rather a **2007 Memorandum of Agreement relating to Construction work which was signed 8 years ago.**
24. In this case, I find that the Defendant has raised triable issues together with some questions in dispute as discussed hereinabove. Therefore, these triable issues and questions in dispute ought to be tried in a proper trial and determined accordingly.
25. The Plaintiff's application in this particular case is related to summary judgment under Order 14 of the High Court Rules, 1988. Reference is made to the following **Notes to Or.14 or 5** in the **Supreme Court Annual Practice 1958** p263 which is very much appropriate and ought to be taken into consideration:

"The power to give summary judgment under Order 14 is 'intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay' (Jones v Stone [1894] A.C. 122). As a general principle, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even

*a fair probability that he has a bona fide defence, he ought to have leave to defend
(Ward v Plumley, (6 T.L.R. 198).*


26. Taking into consideration all above and in exercise of this Court's discretion whilst applying the appropriate applicable principles to the nature of the Plaintiff's application, the Defendant ought to be allowed to defend this action in a proper hearing.
27. I make the following orders-

FINAL ORDERS

- (i) The Plaintiff's application seeking an order for summary judgment against the Defendant is hereby refused and accordingly dismissed.
- (ii) The Substantive Action to takes its normal causes.
- (iii) Costs is summarily assessed against the Plaintiff payable to the Defendant within 14 days in the sum of \$650.
- (iv) Orders accordingly.

Dated at Suva this 24th Day of July, 2018




Master
VISHWA DATT SHARMA

*cc. HM Lawyers, Suva
Nasinu Town Council*