

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action HBC No. 241 of 2004

BETWEEN: **UDAY CHAND**

PLAINTIFF

A N D: **MAHENDRA PRASAD**

DEFENDANT

BEFORE: **Hon. Justice Kamal Kumar**

COUNSEL: **Ms M. Rakai for the Plaintiff**
Ms N. Karan for the Defendant

DATE OF JUDGMENT: **31 August 2018**

JUDGMENT

Introduction

1. On 29 June 2004, Applicant (Plaintiff) caused Writ to be issued with Statement of Claim claiming for damages for judgment in the sum of \$42,000.00, damages for breach of contract, interest and costs arising out of building contract.
2. On 12 July 2004, and 20 August 2004, Defendant filed Acknowledgement of Service and Statement of Defence respectively.
3. On 12 January 2006, (**after lapse of almost 1 year 4 months**) Plaintiff filed Notice of Intention to Proceed.
4. On 15 January 2006, Plaintiff filed Summons for Direction and Reply to Statement of Defence.
5. On 29 November 2006, Order on Summons for Direction was made.
6. On 13 February 2007, parties were directed to file Affidavit Verifying List of Documents ("**AVLD**"), to exchange documents, hold Pre-Trial Conference (**PTC**), file Minutes of PTC and this matter was adjourned to 30 March 2007, for further direction.
7. On 2 March 2007, Plaintiff filed AVLD.
8. On 30 March 2007, parties were directed to finalise PTC and file Minutes of PTC and this matter was adjourned to 15 May 2007, and was further adjourned to 21 June 2007.
9. On 21 June 2007, this matter was adjourned to 18 July 2007, due to non-appearance for and on behalf of Defendant.
10. On 29 June 2007, Defendant filed AVLD.
11. On 19 July 2007, Defendant sought Leave to amend Statement of Defence when Court directed Defendant to file and serve Application for Leave to Amend Statement of Defence and adjourned this matter to 9 September 2007.

12. On 22 August 2007, Defendant filed Application for Leave to Amend the Statement of Defence and such Leave was granted on 3 September 2007.
13. On 4 September 2007, Defendant filed Amended Statement of Defence and Counterclaim.
14. On 9 October 2007, Defendant entered Default Judgment on counterclaim.
15. On 15 October 2007, parties were directed to convene PTC and filed Minutes of PTC and this matter was adjourned to 23 November 2007.
16. On 22 November 2007, Plaintiff filed Reply to Defence and Defence to Counterclaim despite Default Judgment being entered on Counterclaim.
17. On 23 November 2007, it was brought to the attention of Court that Default Judgment on Counterclaim had been entered.
18. On 13 December 2007, Plaintiff filed Application to set aside Default Judgment on Counterclaim.
19. On 17 January 2008, being returnable date of setting aside Application parties were directed to file Affidavits and the Application was adjourned to 12 March 2008, for mention.
20. The Application was next called on 7 April 2008, when it was adjourned to 27 May 2008.
21. The Application was next called on 23 June 2008, and adjourned to 28 July 2008, for hearing.
22. On 15 September 2008, Default Judgment was set aside by consent and Statement of Defence to Counterclaim, already filed was regularised.
23. On 1 October 2008, Plaintiff filed fresh Summons for Direction and Order in terms of Summons for Direction which was made on 3 November 2008, and this matter was adjourned to 26 February 2009.

24. On 26 February 2009, parties were directed to re-convene PTC and file Minutes of PTC and this matter was adjourned to 20 April 2009.
25. This matter was next called on 2 August 2010, when this matter was adjourned to take its normal course.
26. On 20 October 2011, (**after lapse of more than a year**) Plaintiff filed Application to dispense with PTC and adopt draft attached to Supporting Affidavit as Minute of PTC and on 16 November 2011, being returnable date of the Application, Plaintiff withdrew the Application, with Leave.
27. On 13 June 2012, (**after lapse of 8 months**) Plaintiff filed Minutes of PTC.
28. On 27 March 2014, (**after a lapse of almost 1 year 10 months**) Plaintiff filed Copy Pleadings and Order 34 Summons and on 28 May 2014, Order in terms of Order 34 Summons was made.
29. On 27 June 2014, Defence Counsel sought time to contact Defendant and this matter was adjourned to 29 August 2014, for mention.
30. On 29 August 2014, this matter was adjourned to 17 March 2015, for trial.
31. On 17 March 2014, trial could not proceed due to Plaintiff supplying documents to Defendant's Solicitor only few days before the trial date and Plaintiff's pleadings was found to be inadequate.
32. On 17 March 2014, trial date was vacated and Court made following Orders/directions:-
 - (i) Plaintiff pay Defendants cost assessed in the sum of \$1,500.00;
 - (ii) Plaintiff do file and serve Application for Leave to Amend Statement of Claim and Supplementary List of Documents;
 - (iii) Parties to file Affidavits in respect to the Application;
 - (iv) Adjourned this matter to 1 May 2015.
33. On 20 March 2015, (after a lapse of almost a year) Plaintiff filed Application for Leave to Amend Statement of Claim.

34. On 30 March 2015, Plaintiff filed Supplementary Affidavit Verifying List of Documents.
35. On 24 April 2015, Defendant by his Counsel consented to Plaintiff's Application to Amend Statement of Claim and Court directed parties to file Amended Pleadings by 9 June 2015, and adjourned this matter to 3 July 2015, for mention only.
36. On 30 April 2015, Plaintiff filed Amended Statement of Claim.
37. On 3 July 2015, this matter was adjourned to 7 August 2015, due to non-appearance of Defence Counsel.
38. On 7 August 2015, Court directed Defendant to file Defence to Amended Statement of Claim, parties to convene PTC, file Minutes of PTC and for Plaintiff to file Amended Copy Pleadings and adjourned this matter to 1 October 2015.
39. On 1 October 2015, Court gave following directions:-
 - (i) Defendant to file and serve Statement of Defence to Amended Statement of Claim by 9 October 2015,
 - (ii) Plaintiff to file and serve Reply to Statement of Defence by 23 October 2015;
 - (iii) Defendant do file and serve Supplementary AVL D by 6 November 2015;
 - (iv) Parties to exchange and inspect documents and hold PTC by 4 December 2015;
 - (v) PTC Minutes to be filed by 18 December 2015;
 - (vi) Plaintiff do file and serve Amended Copy Pleadings by 31 December 2015;
 - (vii) Defendant to pay Plaintiff's cost in the sum of \$300.00 by 9 October 2015;
 - (viii) Adjourned this matter to 5 February 2016.

40. On 9 October 2015, Defendant filed Statement of Defence to Amended Statement of Claim.
41. On 6 November 2015, Plaintiff filed Reply to Defence.
42. On 5 February 2016, this matter was adjourned to 15 April 2016, for parties to comply with direction given on 1 October 2015, and NOAH to be served on Defendant's Solicitors.
43. On 12 April 2016, Plaintiff filed Minutes of PTC.
44. On 15 April 2016, this matter was adjourned to 2 and 3 November 2016, for trial.
45. On 4 May 2016, Plaintiff filed Amended Copy Pleadings.
46. Trial proceeded and completed on 2 November 2016.

Application for Adjournment

47. When this matter was called for trial on 2 November 2016, Plaintiff's Counsel made an application for adjournment on the following grounds:-
 - (i) Plaintiff informed them on 25 October 2016, that he will not be able to come for trial;
 - (ii) Solicitors got letter yesterday (1/11/16) from Medical Officer;
 - (iii) Solicitors office tried to contact Plaintiff at his work place and Plaintiff said he will not be able to come to Court when he was contacted by Solicitors office on 25 October 2016;
 - (iv) Plaintiff's Solicitors wrote to Defendant's Solicitors and to Court on 1 November 2016 (a day before the trial), enclosing Medical Certificate.
48. Counsel for the Defendant objected to Application for adjournment on following grounds:-
 - (i) Defendant is in Court and is ready to proceed;

- (ii) In March 2015, trial date was vacated to allow Plaintiff to amend Statement of Claim;
 - (iii) Defendant had gone for open heart surgery three (3) months ago;
 - (iv) Plaintiff only went to see medical officer a day before the trial and there is nothing to suggest that Plaintiff has been sick from 25 October 2016.
49. This Court after listening to both Counsel exercised its discretion and refused application for adjournment on following grounds:-
- (i) Court was not convinced that Plaintiff was so sick that he could not travel;
 - (ii) Medical Certificate was only obtained on 1 November 2016 (a day before trial);
 - (iii) Plaintiff had already indicated to his Solicitors on 25 October 2016, that he will not be coming to Court;
 - (iv) This is 2004 matter (12 years old) and needed to be disposed off.
50. Plaintiff could not proceed with his claim and as such Plaintiff's Claim had been struck out with Defendant proceeding with his counterclaim.

Defendant's Case

51. Defendant during examination in chief gave evidence that:-
- (i) He is 57 years old, is a building contract and has been running his business under the name of Grace Builders since 2004;
 - (ii) Uday Chand, Plaintiff, had a bookshop in Suva and in 2004, he entered into to a contract with him to do concrete building structure at Bayview Heights;
 - (iii) He did building structure and then Plaintiff instructed him to do joinery works;
 - (iv) It took him nine to twelve months to complete the work;

- (v) Arrangement between him and Plaintiff was that Plaintiff would give him money for weekly wages and for materials he bought from Vinod Patel;
- (vi) He paid Vinod Patel every month and all materials bought were pre-approved by Plaintiff;
- (vii) Plaintiff did not check invoices all the time;
- (viii) Plaintiff gave him the contract and as such he had to buy materials and Plaintiff was to make his payment;
- (ix) Plaintiff did not complain about building works being done;
- (x) He employed close to twenty employees and he finished work in nine (9) months;
- (xi) When asked as to what was the total amount owed to him by Plaintiff he stated it is written in contract letter;
- (xii) Extra works he did after nine (9) months were retaining wall around the building, fences, gate and some work inside the building which job was worth \$60,000.00 to \$70,000.00;
- (xiii) After extra work, Plaintiff owes him fifty thousand dollars (\$50,000.00);
- (xiv) When asked if he provided invoice to Plaintiff he stated that everytime he bought materials he marked it and give receipts to Plaintiff and he did not keep copies of receipts;
- (xv) He did not take any action for monies not paid to him by Plaintiff but went to Plaintiff and demanded payment when Plaintiff said he does not have his (Defendant's) money with him;
- (xvi) His foreman was Rajesh Pal who passed away two years ago;
- (xvii) His son-in-law Bal Chand was also with him at that time and is present in Court, is aware that some money is owed to him;
- (xviii) The value of the subject property would be close to three quarter million dollars;
- (xiv) He heard that Plaintiff sold his house.

52. During cross-examination Defendant:-

- (i) Stated that he knew Plaintiff from 2003;
- (ii) Agreed that he signed building contract with Plaintiff and stated that he cannot remember the contract amount which is written in the contract;
- (iii) When shown building contract he agreed that it is dated 28 May 2000, and amount is \$115,000.00 with period of contract being six (6) months;
- (iv) Agreed that he was to construct at his own costs and charges;
- (v) Agreed that building was to be completed within six (6) months but stated that finishing work was not included;
- (vi) Agreed that in the contract it says that if he is not able to complete the work he would be liable to pay \$40.00 per day;
- (vii) When it was put to him that he delayed by three (3) months he stated that he did lot of extra work and there was no delay;
- (viii) Stated that there was extra work due to changes in the building and tile laying;
- (ix) Stated he cannot remember when he finished the work;
- (x) Stated completion certificate was taken by Plaintiff and Plaintiff was supposed to obtain it and he did not know anything out of the certificate;
- (xi) Stated that materials were supplied by Vinod Patel and other companies as well;
- (xii) Agreed that he made arrangements with Vinod Patel to pay every month;
- (xiii) When asked if all material was checked he stated that he had responsibility and that he had no other jobs and it was the only job;
- (xiv) Agreed that he does not have any document to give to Court to show what Plaintiff owes him and no evidence to say what Plaintiff owes him;
- (xv) When asked that, if he does not have any documentary evidence then how could he claim for extra work he stated that Iqbal Khan drew the Counterclaim;
- (xvi) Stated that he does not have any paperwork to show to Court.

53. In re-examination Defendant:-

- (i) Stated that Plaintiff agreed to extend the terms from six (6) months to nine (9) months and Plaintiff was aware about extra work he was doing;
- (ii) Stated that he is aware building certificate is given when building is completed;
- (iii) Stated that he did not give completion certificate to Plaintiff because Plaintiff did not demand for it and Plaintiff did not give his remaining balance.

54. This Court notes that Plaintiff's Counsel was instructed to cross-examine Defendant on Defendants counterclaim which only comprised of claim for alleged extra work carried one by Plaintiff on the ground that Plaintiff's claim had been struck out as appears at paragraph 50 of this Judgment.

55. It is trite law that a party who claims for judgment sum or damages to be assessed by Court must provide some sort of evidence to prove his/her claim.

56. In this instance, Defendant failed miserably to prove his counterclaim by failing to provide any form of evidence to show that Plaintiff owed him \$56,000.00 as claimed in the counterclaim.

57. The amount claimed by Defendant only came to light when he engaged Iqbal Khan & Associates who with Leave of the Court filed Amended Statement of Defence and Counterclaim.

58. This Court has no option but to dismiss Defendant's counterclaim, for lack of evidence.

Costs

59. This Court takes into consideration that Plaintiff filed his claim and failed to attend Court for trial and trial lasted for half a day, with Plaintiff's Counsel filing Submissions as directed by Court and Defendants Counsel failed or neglected to do so.

60. This Court after considering the above facts and in particular Plaintiff's failure to attend to trial of a matter filed by him some twelve (12) years ago and not prosecuting it diligently, is of the view that Plaintiff should pay Defendants costs which is to be on lower side.

Orders

61. This Court makes following Orders:-

- (i) Plaintiff's claim is struck out;
- (ii) Defendant's counterclaim is dismissed and struck out;
- (iii) Plaintiff do pay Defendant's costs of this action assessed in the sum of \$1,500.00 within twenty-one (21) days from date of this Judgment.



At Suva

31 August 2018

SHERANI & CO. FOR PLAINTIFF

PACIFICA CHAMBERS FOR DEFENDANT