

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 540 of 2006

BETWEEN : **METUISELA CAMA** retired public servant of Suva.
PLAINTIFF

AND : **HOME FINANCE COMPANY LIMITED** a limited liability company
having its registered office in Suva, Fiji.
FIRST DEFENDANT

AND : **WESTPAC BANKING CORPORATION** a limited liability company
having its registered office in Suva, Fiji.
SECOND DEFENDANT

Date of Judgment : 14th September, 2018

JUDGMENT

INTRODUCTION

1. The Plaintiff filed this action for damages against the two Defendants for bad faith as well as for negligence for the mortgagee sale of a property. The Plaintiff has claimed for unconscionable conduct and also for economic duress. The property was mortgaged to the Defendants and the Plaintiff was given the opportunity of selling it before the mortgagee sale but had not exercised that opportunity. The same property was subjected to a third party mortgage to the 2nd Defendant. Both loans were in arrears and several demand notices were made without any success of recovering the loans.
2. This action was concluded before another judge. All the parties to the action consented me delivering the judgment upon the evidence and submissions already submitted. The delay is regretted.
3. The Plaintiff obtained a loan from the First Defendant to purchase a property and it was through a mortgagee sale of Australia and New Zealand Banking Group Limited.

4. The land comprised in Certificate of Title No. 165817 being Lot 36 on D. P. 3971 situate at 36 Volavola Road, Tamavua, Suva (The Land) for a sum of \$35, 500.00.
5. The First Defendant had advanced loan facilities to the Plaintiff to purchase the Land. The First Defendant as a security took a first registered mortgage over the Land.
6. The Plaintiff defaulted under the loan arrangement and the First Defendant sold the property under its mortgage. The Plaintiff brings this claim for negligence and also for bad faith, against the First Defendant for the sale of the said Land.
7. The Terms of loan agreement between the Plaintiff and 1st Defendant inter alia stated as follows:
 - (a) The Term for the payment of the loan by the Plaintiff to the First Defendant was 15 years:
 - (b) Amount of \$477.00 per month was payable covering principal and interest:
 - (c) The First Defendant will be entitled to charge interest on its advances at the rate of 9.5 per annum or at such rate the First Defendant may require the Plaintiff to pay.
8. The Plaintiff admitted that he was paying only \$346.00 a month and thereafter arrears were accumulated.
9. The Plaintiff did not produce evidence that 1st Defendant revised Letter of Offer for such arrangement for payment of lesser sum.
10. The Plaintiff could not keep up with the repayments despite being given a number of opportunities by the First Defendant
11. The Plaintiff states that the First and Second Defendant of colluding with each other for mortgagee sale of the Land. There was default by the Plaintiff thereby giving rise to the First Defendant being entitled to exercise its powers of sale.
12. The 2nd Defendant obtained only a residue of the proceeds from the mortgagee sale after settlement of the debt to the Plaintiff which consisted major part, part of the sum realized from mortgagee sale.

13. Section 81 of the Property Law Act sets out who gets paid when a property is sold under a mortgage:
The proceeds of sale are applied as follows:
 - (a) FIRSTLY towards the costs of and incidental to the sale;
 - (b) SECONDLY towards the debt owed to the first mortgagee;
 - (c) THIRDLY towards payment of subsequent encumbrances according to their priority.
 - (d) FOURTHLY, the surplus, if any, shall be paid to the mortgagor.

14. The First Defendant sent reminder letters from 6 May 1998 to the Plaintiff in anticipation that he would regularize his account. On 19 October 2004, the First Defendant Solicitors issued Demand Notice on the Plaintiff calling up its loan. The Demand Notice specified that the debt balance due and owing as at 13 October 2004 was \$32,157.57 with interest continuing to accrue on the said account at the rate of 12.28% per annum from 14 October 2004.

15. The Plaintiff failed to honour the demands made or made satisfactory offers to settle the same that were acceptable to the 1st Defendant.

16. The First Defendant duly exercised its powers of sale under the loan agreement and more particularly under Mortgage No. 474145 over the Land.

17. The First Defendant prior to the disbursement of the loan funds got the security property valued from South Pacific Rolle Limited. The valuation was carried out on the 25 February 1997 by Nathindra Prasad. In his valuation report stated
 - i. The current market value \$75,000.00
 - ii. Force sale value \$65,000.00
 - iii. The insurance value \$61,000.00

18. The Plaintiff did not dispute the said valuation at that time but in 2003 he had obtained another valuation and it was from Fir View Valuation. The valuation report dated 31 July 2003 addressed to a third party. The said valuation did not contain a forced sold price. In evidence admitted that such a sale would have a lower value.

19. The First Defendant advertised the mortgage sale in the daily newspapers in order to obtain a fair market price for the property.
20. The First Defendant instructed Appraisals Pacific to carry out a valuation of the property. A Kerbsite valuation was carried out due to the fact that the Plaintiff was still occupying the property and the Valuer could not gain internal access into the residence. The valuation report dated 25 August 2005 provided three different values. The three values are as follows:
 - i. Market Value \$55,000.00
 - ii. Reinstatement Value \$16,000.00
 - iii. Force Sale Value \$39,000.00
21. The Plaintiff had not cooperate with the valuation or sale of the property thus making it difficult to obtain a valuation or sale through proper inspection of the property. The Plaintiff had to be removed from the property as he was discouraging other prospective buyers from inspecting the property and tendering to purchase the property.
22. The First Defendant had made several attempts to dispose the property through private sale but it was also not successful. The Plaintiff did not bring a single buyer for the land and was only a hindrance to the sale as well as to valuation and cannot complain about the price.
23. Once the highest tender was received for the sale of the said land the First Defendant then gave the Plaintiff another opportunity to redeem the mortgage by paying the debt off before it accepted the tender. The Plaintiff failed to repay the loan within the requisite time frame and then the First Defendant exercised its rights under its mortgage and accepted the tender.
24. Justice Singh in *Fiji Development Bank v Kaushal Kishore Singh and Another*, Civil Action No. HBC 375/03, where at page 7 of the court said that:

"The court also notes that the sale was pursuant to a mortgagee sale not between a willing buyer and willing seller. It is a forced sale; the mortgage is

because of the mortgagors default forced to sell the property. The sale has to be seen in this context."

25. The First Defendant acted within its powers to sell the said land for the consideration sum of \$58,000.00 and there is no proof of bad faith or negligence on the part of the 1st Defendant who had exercised its contractual rights.
26. In *Farras v Farras Limited* (1888) 4 Ch D, it was stated that:

"But every mortgage confers upon the mortgagee the right to realize his security and to find a purchaser if he can, and if in exercise of his power he acts bona fide and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale has been postponed: Cholmondeley Clinton; Warner v Jacob"
27. The First Defendant produced evidence to show it had advertised the property for sale in all the daily local newspapers that are currently in circulation. A total of three mortgagee sale advertisements were placed in the newspapers. Despite that, the Plaintiff alleges that the First Defendant had insufficiently and inadequately advertised the property of the mortgagee sale.
28. The First Defendant through its solicitors advertised the mortgagee sale thrice in the local newspapers. Therefore, the First Defendant respectfully submits that there is no merit in the Plaintiff's allegations that the mortgagee sale was insufficiently and adequately advertised.
29. The Plaintiff defaulted under the loan agreement and the First Defendant after sending reminder letters to the Plaintiff to regularize this account, issued a Demand Notice calling for the total debt and all these were done in terms with the terms of the contract between the 1st Defendant and Plaintiff when it obtained a loan through mortgage.
30. The Plaintiff was given more than five years to remedy the default or to sell the property on his own. Despite the time given, the Plaintiff did not provide details of at least one potential buyer. Producing a valuation alone is not sufficient to prove that the 1st

Defendant was negligent, there should be buyers to purchase at that price given even though a private sale.

31. The Plaintiff had in fact obstructed the sale by not allowing proper inspection of the property that had resulted not obtaining a higher price. In such circumstances, the Plaintiff's allegation that he was not given sufficient time is not proved on balance of probability as a valid ground for bad faith on the part of the 1st Defendant.
32. The Plaintiff relied on the bulk of the funds sourced from National Provident Fund to reduce the debt with the First Defendant. He produced a letter dated 10 August 2004 addressed to him indicating his eligibility for the sum of \$6,664.00 under the Housing Assistance Scheme with the Fiji National Provident Fund. The Plaintiff failed to fill in the requisite forms for the transfer of funds. He did not produce evidence that FNPF wrote to the First Defendant that it has approved the sum of \$6,664.00 and would release the funds directly to the First Defendant to reduce the debt.
33. The Plaintiff stated that after providing the documents to Mr. Singh of the 1st Defendant, he was informed during that meeting that Westpac Banking Corporation was also selling the property under mortgagee sale. The offer of Fiji National Provident Fund (FNPF), lapsed because the Plaintiff failed to meet the criteria required under the Fiji National Provident Funds Housing Assistance Scheme. There was no evidence produced by him during the meeting that he instructed FNPF to pay the sum of \$6,664.00 to reduce the debt.
34. The highest tender the first Defendant was able to secure was \$58,000.00 which was above the valuation done on the property, where the Plaintiff had not allowed the valuers to enter the property. The Plaintiff was unable to produce a buyer for a higher price.
35. There was no guarantee that by postponing the sale the First Defendant would have secured a better price there cannot be indefinite postponement of mortgagee sale when the debt is accruing and it is a decision that is left to the mortgagee in terms of the contractual power. It has waited for some time to secure the best possible price and

Plaintiff cannot decide for the mortgagee. It has acted in good faith and paid the second Defendant the sum of \$9,703.35 being the residual sum due to 2nd Defendant.

36. The Plaintiff's claim that the first Defendant's action amount to economic duress because of the unequal bargaining does was not proved on the balance of probability. The Plaintiff had approached the 1st Defendant in order to purchase finances for the purchase of a property and the loan was given under certain conditions.
37. There was no proof of economic duress from the Defendants or unconscionable conduct as the Plaintiff had voluntarily entered in to respective mortgage documents with the Defendants.

CONCLUSION


38. The Plaintiff has failed to prove that there was bad faith or negligence on the part of the 1st and 2nd Defendant. It had exercised the mortgagee sale in terms of the contract entered between the Plaintiff and 1st Defendant in the process of granting a loan. The Plaintiff had also failed to prove unconscionable conduct and economic duress against the Defendants. The action is struck off. Considering the circumstances no costs are awarded.

FINAL ORDERS

- a. The Plaintiff's action is struck off.
- b. No Costs.

Dated at Suva this 14th day of September, 2018




Justice Deepthi Amaratunga
High Court, Suva