

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 235 of 2013

BETWEEN : **DEBORAH BRYANT AND LINDA AMODEA** both of 226 Countryside Drive, Irvin, Texas, United States of America

PLAINTIFFS

AND : **SAMBHU LAL CONSTRUCTION (FIJI) LIMITED** a limited liability Company having its registered office at Savusavu

DEFENDANT

BEFORE : Justice Riyaz Hamza

COUNSEL : Ms. Mary Muir for the Plaintiffs
Mr. Amrit Sen for the Defendant

RULING

INTRODUCTION AND BACKGROUND

[1] The Plaintiff instituted these proceedings by way of a Writ of Summons, which was issued on 8 August 2013. As per the Statement of Claim attached thereto the Plaintiffs, inter alia, state as follows:

1. The Plaintiffs permanently live in the United States of America and are frequent visitors to Fiji. They have permanently purchased Lot 11 and Lot 137 of Dere Bay, Koro Island.

2. The Defendant is a limited liability Company having its registered office at Savusavu.
3. On or about 7 September 2005, the Plaintiffs entered into a contract with the Defendant for construction of two residential dwellings at Lot 11 and Lot 137 Dere Bay, Koro Island, in accordance with the specifications and plans stated in the said contract, at a price of FJ\$484,000.00.
4. It has been agreed between the parties that the Plaintiffs have collectively paid FJ\$446,766.96 to the Defendant Company for the aforesaid construction work.
5. However, the Plaintiffs claim that the Defendants have breached the conditions stipulated in the contract. They also claim that the Defendants have acted fraudulently and as a result the Plaintiffs have suffered grave injustice.
6. Due to the Defendant's breach of contract, fraudulent acts and irregular work on the project, the Plaintiffs are said to have suffered a substantial loss of FJ\$258,300.00.
7. Accordingly, the Plaintiffs claims the following reliefs:
 - i) An order for reimbursement of FJ\$258,300.00 into the custody and care of the Plaintiffs
 - ii) Costs on a full scale indemnity basis;
 - iii) Any further Orders as Court deems just.

[2] On 12 September 2013, the Defendant filed a Statement of Defence and Counterclaim. In their Statement of Defence, the Defendant denies each and every allegation contained in the statement of claim, save for those specifically admitted.

- [3] The Defendant further submits that the Plaintiffs' action is statute barred and has been brought in response to a claim filed against the Plaintiffs in the Labasa High Court in the form appearing in the Counterclaim.
- [4] By way of Counterclaim, the Defendant, inter alia, states that they attended to the construction of the building in accordance with the plans and specifications and the said variations as requested by the Plaintiffs and brought the building to almost completion. However, the Plaintiffs refused to allow the Defendant to fully complete the said building and wholly repudiated and put an end to the contract on or about 27 April 2007.
- [5] The Defendant claims that a sum of FJ\$51,921.18 remains unpaid for the construction of the dwelling houses on Lot 11 and Lot 137 and a sum of FJ\$68,757.46 remains unpaid for variation work carried out on the Lot 11 dwelling house. As such, the Defendant claims they have suffered loss and damages in the sum of FJ\$120,678.64.
- [6] On 30 October 2013, the Plaintiffs filed a Reply to the Statement of Defence and Defence to Counterclaim. Therein, the Plaintiff denies the allegations made by the Defendant in their Statement of Defence that this action is statute barred and submits that the action is not statute barred as this action is based on the fraud of the Defendant.
- [7] Trial in this matter was held before me on 22 June, 23 June and 28 June 2016. The testimony of the two Plaintiffs Deborah Bryant and Linda Amodeo was led and concluded before me.
- [8] At the conclusion of the said evidence, on 29 June 2016, the Plaintiffs filed a Summons for Leave to Adduce Photographs into Evidence. The Summons were supported by an Affidavit of the First named Plaintiff, Deborah Bryant. The Defendant filed Affidavit in Opposition, on 4 August 2016.
- [9] On 8 July 2016, the Defendant filed a Summons that certain questions of law be determined first before this action proceeds further by way of hearing. The questions

of law to be determined was that the action was statute barred in terms of Section 4 of the Limitation Act (Chapter 35 of the Laws of Fiji). The said Summons was supported by an Affidavit filed by Shiu Dayal Sharma, Managing Director of the Defendant Company.

[10] This application is said to be made pursuant to Order 33, Rule 4 of the High Court Rules 1988 and the inherent jurisdiction of Court.

[11] The Counsel for the Plaintiff submitted that the Plaintiffs do not wish to file any Affidavit in Reply as the Summons deals with questions of law (legal issues) that could be dealt with at the hearing.

[12] Furthermore, on 28 September 2016, the Plaintiffs filed an Inter Parte Summons for Leave to Amend the Statement of Claim.

[13] Both parties were in agreement that the Summons filed by the Defendant be taken up for hearing first, as a determination made by Court therein, would have a bearing on the case as a whole.

[14] Accordingly, this matter was taken up for hearing before me on 30 September 2016. Both Counsel for Plaintiffs and Defendant were heard. The parties also filed comprehensive written submissions, and referred to several case authorities, which I have had the benefit of perusing.

THE SUMMONS FILED BY THE DEFENDANT

[15] In the Summons filed by the Defendant, it is stated as follows:

*“.....That the following questions of law **be determined first** before this action proceeds further by way of hearing:-*

- 1. Having regard to pleadings filed in this action and the oral testimony of Deborah Bryant and Linda Amodeo – the Plaintiffs in these proceedings- and having regards to Section 4 of Limitation Act; whether the agreement dated 7th September 2005 pursuant to which this action is filed on 8th August 2013 against the Defendant is barred by Section 4 of the Limitation Act.*

2. *If the agreement pursuant to which this action having been brought, the cause of action accrued either at the end of March 2007 or when the agreement dated 7th September 2005 (pages 15-17 of the bundle of documents, exhibit No. 9) between the parties were wholly repudiated/cancelled by the Plaintiffs on 27th April 2007 through the letter of the Plaintiffs Solicitor (Plaintiffs exhibit No. 17 contained on page 159 of the bundle of documents, items No. 54); whether any substantive action could lie at the behest of either party for damages or any consequential orders arising from breach as claimed by the Plaintiff.*

THE AFFIDAVIT FILED IN SUPPORT OF THE SUMMONS

- [16] The Summons is supported by an Affidavit of Shiu Dayal Sharma, Managing Director of the Defendant Company. Therein he sets out the reasons why the Defendant is seeking the above questions of law to be determined first before this action proceeds further by way of hearing.
- [17] Shiu Dayal deposes that having perused the pleadings in these proceedings, and had the opportunity of hearing the evidence of both Plaintiffs, it has become unequivocally clear that the agreement pursuant to which this action is being brought is dated 7 September 2005.
- [18] Pursuant to the said agreement, the Defendants had commenced work for the Plaintiffs and there have been alleged breaches of the agreement.
- [19] The Plaintiffs have categorically stated that the Defendants walked out from the site sometimes in March 2007 and have never returned. The Plaintiffs cancelled the agreement on 27 April 2007, through the letter of their Solicitors.
- [20] He verily believes that the cause of action against the Defendant accrued at the end of March 2007 or at the time when the Plaintiffs cancelled the agreement on 27 April 2007. As such, the Plaintiffs did not have any cause of action against the Defendant after 26 April 2013.

[21] The proceedings against the Defendant was instituted on 8 August 2013, when the Writ of Summons was filed in the High Court.

LEGAL PROVISIONS AND ANALYSIS

[22] This application is said to have been made in terms of Order 33, Rule 4 of the High Court Rules. However, during the hearing of this application the Counsel for the Defendant submitted that he is also relying on the provisions of Order 33, Rule 3.

[23] Order 33, Rules 3 and 4 are reproduced below:

“3. The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

4.(1) In every action begun by writ, an order made on the summons for directions shall determine the place and mode of the trial; and any such order maybe varied by a subsequent order of the Court made at or before the trial.

(2) In any such action, different questions or issues may be ordered to be tried at different places or by different modes of trial and one or more questions or issues may be ordered to be tried before the others.”

[24] Section 4 of the Limitation Act contains provisions dealing with limitation of actions of contract and tort, and certain other actions. The Section is reproduced below for ease of reference:

“4.-(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-

(a) actions founded on simple contract or on tort;

(b) actions to enforce a recognizance;

(c) actions to enforce an award, where the submission is not by an instrument under seal;

(d) actions to recover any sum recoverable by virtue of any Act, other than a penalty or forfeiture or sum by way of penalty or forfeiture:

Provided that-

(i) in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years; and

(ii) nothing in this subsection shall be taken to refer to any action to which section 6 applies.

(2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.

(3) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued:

Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

(4) An action shall not be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

(5) An action to recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any Act or imperial enactment shall not be brought after the expiration of two years from the date on which the cause of action accrued:

Provided that for the purposes of this subsection the expression "penalty" shall not include a fine to which any person is liable on conviction of a criminal offence.

(6) Subsection (1) shall apply to an action to recover seamen's wages, but save as aforesaid this section shall not apply to any cause of action within the Admiralty jurisdiction of the Supreme Court which is enforceable in rem.

(7) This section shall not apply to any claim for specific performance of a contract or for any injunction or for other equitable relief, except in so far

as any provision thereof may be applied by the court by analogy in like manner as has, prior to the commencement of this Act, been applied.”

[25] The Plaintiffs submit that this action is not statute barred as they are alleging fraud against the Defendant.

[26] Section 15 of the Limitation Act provides for the postponement of the limitation period in cases of fraud or mistake in the following terms:

“15. Where, in the case of any action for which a period of limitation is prescribed by this Act, either-

(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person; or

(c) the action is for relief from the consequences of a mistake,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against or set aside any transaction affecting, any property which-

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”

[27] In this case the Defendant is taking up the position that the action is statute barred in terms of Section 4 of the Limitation Act. However, the Plaintiffs counter this position by submitting that the action is not statute barred as the action is based on the fraud of the Defendant. The Plaintiffs are relying on Section 15 of the Limitation Act.

- [28] The Counsel for the Defendant contends that 'fraud' must be particularly pleaded and particularized and that the Plaintiffs have failed to do so. The Counsel provided authorities to support this contention.
- [29] However, at this point in time what Court has to determine is only whether the questions of law as set out in the Summons filed by the Defendant should be determined first before this action proceeds further by way of hearing.
- [30] In determining so, Court has carefully examined the pleadings filed in this case. The fact that, when confronted by the First named Plaintiff, the Defendant ordered all their workmen to abandon the construction site has been pleaded in the Statement of Claim (paragraph 31).
- [31] The fact that on 27 April 2007, the Plaintiffs instructed Crompton Lawyers to write a letter to the Defendant terminating the agreement, dated 7 September 2005, has also been pleaded in the Statement of Claim (paragraph 34).
- [32] At paragraph 43 of the Statement of Claim, the Plaintiffs have stated "THAT the Defendant's actions constitute actual fraud in that he demanded payments from the Plaintiffs knowingly allowing them to send money and having the Plaintiffs believing that the money sent was being used for the property when it was not."
- [33] Furthermore, at paragraph 45 of the Statement of Claim, it is stated thus: "THAT the Plaintiffs, after realising that they had been deceived by the Defendant, started taking action by turning to relevant authorities to assist them in seeking justice to their loss."
- [34] At paragraph 49 of the Statement of Claim, the Plaintiffs allege that they have suffered a grave injustice due to the fraudulent acts of the Defendant.
- [35] The Defendant purports that having had the opportunity of hearing the evidence of both Plaintiffs, that these matters have become unequivocally clear. However, all these matters have been originally pleaded in the Statement of Claim by the Plaintiffs.
- [36] Thus the Defendant was well aware of all these factors prior to the trial in this matter commencing. An application for determining the relevant questions of law could have

been made by the Defendant at the very outset of these proceedings or at least prior to the matter being taken up for trial.

[37] Therefore, this Court is not inclined to permit the application made by the Defendant for the questions of law set out in the Summons to be determined at this point in time, before this action proceeds further by way of hearing.

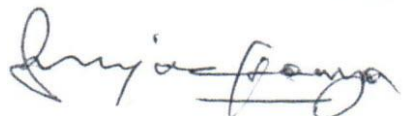
[38] Therefore, I hold that the Summons filed by the Defendant is without merit and should be struck out.

[39] Accordingly, I make the following Orders:

ORDERS

1. The Summons filed by the Defendant is struck out.
2. The Costs in this Application shall be costs in this cause.

Dated this 6th day of March 2019, at Suva.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

