

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

CIVIL ACTION NO.: HBC 311 of 2017

BETWEEN : **SUSHIL PRASAD SHARMA** **PLAINTIFF**

AND : **SURUJ SHARMA** practicing under the name and style
PATEL SHARMA LAWYERS having its registered
Office at the 1st Floor Sports World Complex, 18 Waimanu
Road, Suva **FIRST DEFENDANT**

AND : **VIJAY MAHARAJ** **SECOND DEFENDANT**

AND : **MUKESH NAND** **THIRD DEFENDANT**

APPEARANCES/REPRESENTATION

PLAINTIFF : Mr S Kumar [Sunil Kumar Esq]

FIRST DEFENDANT : Mr E Narayan [Patel Sharma Lawyers]

SECOND DEFENDANT : Mr V Maharaj [MC Lawyers]

THIRD DEFENDANT : Not Present [Nands Law]

RULING OF : Acting Master Ms Vandhana Lal

DELIVERED ON : 07 March 2019

INTERLOCUTORY RULING

- i. Striking Out – Order 18 rule (18) by Second Defendant
 - ii. Leave To Enter Default Judgment against First & Third Defendants by the Plaintiff
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1. On 1 November 2017 Plaintiff in person filed a Writ of Summon against the Defendants.

Allegation are that the Defendants by fraud and through undue influence got the Plaintiff to enter into a terms of settlement.

The Plaintiff is seeking orders that the terms of settlement so entered be set aside and he be paid damages and First Defendant refunds the legal fees so paid.

2. The Writ of Summon was served on Second Defendant on 6 November 2017 and on the First and Third Defendant on 9 November 2017.
3. The Second Defendant filed his acknowledgment of service on 1 November 2017.
4. The Third Defendant filed his acknowledgment of service on 9 November 2017 and a Statement of Defence on 23 November 2017. As per Affidavit of Service filed on 13 August 2018 the Plaintiff was served with Third Defendants Statement of Defence on 7 February 2018.
5. The First Defendant filed his acknowledgment of service on 13 November 2017 and a Statement of Defence on 27 November 2017. As per the Affidavit of Service filed on 14 March 2018 the Plaintiff was served with First Defendants Acknowledgment of Service and Statement of Defence on 12 March 2018.
6. On 17 November 2017, the Second Defendant filed a summons whereby he seeks orders that the Plaintiff's Statement of Claim be struck out under Order 18 rule 18 (1) on the ground that:
 - i. It discloses no reasonable cause of action and is an abuse of process.
7. On 2 February 2018 the Plaintiff in person filed a summon pursuant to Order 19 rule 7 by High Court Rules seeking orders for Default Judgment to be entered against the First and Third Defendant having defaulted in filing Statement of Defence.
8. On 13 March 2018 Messrs Sunil Kumar Esquire filed a notice of appointment of solicitors on behalf of the Plaintiff.

STRIKING OUT BY SECOND DEFENDANT

9. The Second Defendant in its submission on striking out of the claim states:
 - *It is not clear from the pleading whether the Plaintiff is seeking the reliefs against First Defendant or against all Defendants;*
 - *The Plaintiff has failed to plead what was the legal relationship between the Plaintiff and the Second named Defendant;*
 - *Is the cause of action against the Second named Defendant Contractual or in tort? There is nothing in the pleading to indicate this at all;*
 - *It appears from paragraph 2 of the Statement of Claim that Maharaj Chandra Lawyers (on whose behalf we do not know) filed claims namely, HBC 441/99, ABU 41/2012 and 48 of 2012 and*

253/12 (presumably against the Plaintiff) in order to defraud the Plaintiff;

How can one file a claim to defraud the Plaintiff has not been explained at all;

- At paragraph 5 of the Statement of Claim the Plaintiff has alleged that the Defendants were under a duty to exercise all due professional care, skill and diligence as a solicitor in relation to the Plaintiff;
- The Plaintiff has failed to give particulars of what duty of care the second named Defendant had towards the Plaintiff if at all. The second named Defendant had never acted as Plaintiff's solicitor at any time. Some of the actions referred to in paragraph 2 of the Statement of Claim, the second Defendant acted as Counsel whilst in the employ of Maharaj Chandra Solicitors, now MC Lawyers, for the Plaintiffs in the said actions or appeals in which the (current Plaintiff) was one of the Respondents/Defendant's claim based on allegation of fraud;
- Paragraph 7 of the statement of claim makes allegations of undue influence, it appears by his solicitors (1st Defendant) to the Plaintiff to sign some kind of "terms of settlement. Once again no particulars have been given on pleaded of any undue influence exerted by the second Defendant.

According to the Second Defendant, the Plaintiff has not shown any cause of action against the Second Defendant either in contract, tort or under any other law.

10. The Plaintiff submits that he and his witness will give oral evidence in court to prove fraud and that the Second Defendant with others had a duty to exercise due diligence, care and skill.

The terms of settlement by consent were obtained under undue influence and/or fraudulent means by the Defendants.

Hence the Plaintiff submits it has a prima facie case against the Second Defendant.

11. In **Bidesi v. Howard** a Suva High Court Civil case number 513 of 1992 Jesuratnam J. held that:

"It is not enough for the defendant to show at this stage that the Plaintiff has a weak case. He should go further and show the Plaintiff has no case at all".

12. The Supreme Court Practice Volume 1, 1993 Part 1 at paragraph 18/19/7 reads:
"A reasonable cause of action means a cause of action with some chance of success when only the allegation in the pleadings are considered (per Lord Pearson in Drummond – Jackson v. British Medical Association [1970]1W.L.R.688"

It further went on to say that:

"so long as the Statement of Claim or the particulars (Darey v. Bentinck [1893] 1 QB. 185) disclose some cause of action, or raise some question to fit to be decided by a Judge or a Jury the mere fact that the case is weak, and not likely to succeed is no ground for striking it out (Moure v. Lawson (1915) 31 T.L.R. 418, C.A.; Wenlock v. Moloney [1965] 1 W.L.R. 1238).

13. Pathik J, in **Goldstein v. Narayan a Suva High Court Civil Action No. HBC 0413 of 2001** considered following passage from Halsbury's Laws of England 4th Edition Volume 37 at paragraph 434 to be pertinent when considering an application for striking out claim on grounds of abuse of process:

"An abuse of the process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or more simply, where the process is misused. In such a case, even if the pleading or indorsement does not offend any of the other specified grounds for striking out, the facts may show that it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or indorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court."

14. Paragraph 18/19/17 in The Supreme Court Practice Volume 1, 1993 Part 1 reads:

"This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation"

15. The Plaintiff mentions that the First Defendant had unduly influenced the Plaintiff to sign a terms of settlement.

However the Plaintiff has failed to identify which Terms of Settlement he refers to and how the Second Defendant is a privy to the said terms of settlement.

The Plaintiff has not set out in his pleadings facts which in his opinion impose on the Defendant a liability or duty.

16. Commentary to Order 18 rule 12 on paragraph 18/12/13 of the Supreme Court Practice Volume 1 (1993) states that "*fraudulent conduct must be distantly alleged and as distinctly proved, and it is not allowable to leave fraud to be intervened from the facts The acts alleged to be fraudulent must be set and then it must be stated that these acts were done fraudulently*".
17. The rule also empowers court to amend the pleading or endorsement in a suitable and proper case.
18. The power to strike out should only be exercised where the case is clear beyond doubt.
19. The Plaintiff had filed the Statement of Claim in person. Now represented by a counsel he should be able to amend the claim in a suitable and proper manner.

Hence exercising the discretion under the said rule I will allow the Plaintiff an opportunity to amend his statement of claim.

Hence I order the Plaintiff to file and serve amended Statement of Claim in 14 days. On the current application, the Plaintiff is ordered to pay cost summarily assessed at \$800 to the Second Defendant in 14 days.

Unless the amended statement of claim is filed and served and cost is paid on or before 4pm on 21 March 2019, the claim shall stand struck out against the Second Defendant with further orders for costs.

DEFAULT IN SERVICE OF DEFENCE

20. Order 19 rule 7 of the High Court reads:

- i. *Where the Plaintiff makes against a Defendant or defendants a claim of description not mentioned in Rules 2 to 5 then, if the Defendant or all the defendants fails or fail to serve a defence on the Plaintiff, the Plaintiff may after the expiration of the period fixed by or under these Rules for service of the defence, apply to the court for judgment, and on hearing of the application the court shall give such judgment as the Plaintiff appears entitled to on his or her Statement of Claim.*

21. Commentary on paragraph 19/7/14 to Order 19 rule 7 of the Supreme Court Practice Volume 1 (1993) states that:

"A defence served after expiration of the prescribed time but before judgment has been given cannot be disregarded, and will generally

prevent the Plaintiff from entering judgment, even though it is not served until after the Plaintiff has served his summons or notice of motion for judgment under this rule but the defendant may be ordered to pay the costs occasioned by his delay”.

22. Applying the above principle and to ensure justice is done I refuse to make orders on the Plaintiff's Summons filed on 22 February 2018 and shall dismiss the same. I accept the First and Third Defendants service of their Statement of Defence out of time.

However, I order both the First and Third Defendant to each pay cost to the Plaintiff in sum of \$500. Said cost is to be paid in 14 days from today.

FINAL ORDERS

23. Following orders are made on the two applications:

i. Second Defendant's application to Strike Out

The Plaintiff to **file and serve** an amended Statement of claim and to pay cost of \$800 to the Second Defendant in 14 days.

Unless the amended statement of claim is filed and served and cost is paid on or before **4pm on 21 March 2019**, the claim shall stand struck out against the Second Defendant with further orders for costs.

ii. Plaintiffs application under Order 19 rule 7;

Service of the First and Third Defendant's Statement of Defence out of time is allowed. Both the First and Third Defendants to each pay cost in sum of \$500 to the Plaintiff in 14 days.




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Vandhana Lal [Ms]
Acting Master
At Suva.