

In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HBC 205 of 2015

Mohammed Asraf Khan

Plaintiff

v

Janifa Bi

Defendant

Counsel: Mr I. Romanu for the plaintiff
Mr Anand Singh for the defendant
Date of Hearing: 17th May, 2019
Date of Judgment: 23rd October, 2020

Judgment

1. The plaintiff, a businessman engaged in building construction states that he obtained financial assistance in a sum of \$33,000.00 from the defendant, (his sister) to pay Merchant Finance for a motor vehicle. The statement of claim states that in return, the parties agreed that the plaintiff will transfer his residential Native lease, Lot 10 located at Natavukica Road, Tacirua East, Nasinu, (lease) to the defendant and construct a double storey dwelling house for her on that land for \$190,000.00, as demanded by her. The plaintiff claims the balance sum of \$157,000.00. He also alleges that as a result of the defendant's failure to pay the sum of \$157,000, his business suffered financial loss in a sum of \$ 507,000.00.

2. The defendant, in her statement of defence denies the claim and states that she acquired the lease from the Housing Authority on 15th March, 2000, for valuable consideration. She denies that she demanded that a double storey house be built for her for \$ 190,000.00
3. The plaintiff, in his reply states that the defendant obtained the lease by fraud. She was an Australian citizen and had no lawful authority to acquire the lease.

The hearing

4. The plaintiff,(PW1) in evidence in chief said that he applied to the Housing Authority for the lease. He executed a sale and purchase agreement with the Housing Authority on 27th May,1998. He paid for the lease with his FNPF monies and sale of his house. He did not secure the title of the lease. He obtained a loan from ANZ Bank and commenced building a house on the leased land in 1999. The defendant assisted him. She filed a DVRO against him, so that he leaves the house.
5. It transpired in cross examination that he never paid ground rent to the Housing Authority. He said that the lease was transferred in the defendant's name. The defendant deposited \$33,000.00 in his account, as a loan to his son. The plaintiff agreed that the averment in the statement of claim that the parties agreed that he will transfer his lease to the defendant in return for her payment of \$ 33,000.00, was incorrect. He started building on the lease in 1999. The defendant gave him \$ 3000.00. He denied that she progressively paid him for work done. He spent \$190,000.00 on the construction of a double storey house for her. Thereafter, she filed a DVRO against him. The charge by the Suva Rural Authority for carrying out an illegal development was withdrawn, as he made representations that the defendant was the owner. He did not make a claim for the sum of \$157,000, until he filed this case.
6. In re-examination, he reiterated that he did not pay ground rental, since the lease was already in the defendant's name. In 2012, she told him that the title is in her name. in answer to Mr Romanu, counsel for the plaintiff, he said that he as all the documents pertaining to the purchases for the construction from "*Suncourt*".

7. DW1, (*Salimoni Karusi, Legal Counsel and Secretary of the Housing Authority*) testified that the lease was initially allocated to the plaintiff. The plaintiff applied for consent to assign the lease to the defendant. DW1 produced the application for consent and a copy of the transfer to the defendant.
8. DW2, (*Chrystal Prasad, Deputy Registrar of Titles*) produced a copy of the lease, which provided that the defendant was the registered proprietor of the lease.
9. DW3, (*the defendant*) said that the plaintiff entered into an agreement to lease with the Housing Authority. He applied for the lease with his FNPF monies. When the Housing Authority issued him a notice stating that he would lose the lease unless he makes payment, he asked her to purchase the lease, so that he does not forego his FNPF monies. She purchased the lease from the Housing Authority. She engaged the plaintiff to build a house on the land based on his Plan. He made the single storey into a double storey house. She paid him progressively in advance. He purchased material from Vinod Patel. She had an account with them. She did not owe him any money. She has always been clearing his debts. He still owes her the \$33,000.00 advanced.
10. In cross-examination, the defendant said that she does not have records of her payments to the plaintiff. The records are with her sister. She maintained that she has paid the plaintiff for the work done.
11. She was not re-examined.

The determination

12. The agreed facts recorded at the PTC provide that the plaintiff entered into a Sale and Purchase Agreement of 27th September, 1999, with the Housing Authority to purchase the lease and the defendant is the registered proprietor of the lease.
13. The issue for determination is whether the plaintiff has “*fabricated his alleged claim ... or is the claim genuine and true*”.

14. The evidence of the plaintiff and the defendant reveals that the plaintiff requested the defendant to purchase the lease, as he encountered financial difficulties and could not pay the ground rental to the Housing Authority. The plaintiff did not transfer the lease to the defendant in return for her loan of \$ 33,000.00.
15. It is not in dispute that the plaintiff built a house on the leased land for the defendant. The question for determination is whether the defendant failed to pay him for the construction works and whether as a result, he suffered consequential loss.
16. The plaintiff claims that it cost him \$190,000.00 to construct the house. The defendant gave him a loan of \$33,000.00 and he claims the balance.
17. The defendant denies the claim and states that she paid him progressively for the works.
18. The claim is in the nature of special damages and that being so, it was for the plaintiff to prove his claim with cogent evidence. The plaintiff failed to give an itemized breakdown of his works together with costs and produce any documentary evidence to establish his claim.
19. In *Khan v Vinod Patel & Company Ltd*, [2008] FJHC 102; HBC141.2006 (30 April 2008) the plaintiff a building contractor had undertaken to build apartments for the defendant. He made claims for scaffolding, for labour and material. Jiten Singh J posed the following question "... where are the invoices ..? He must have paid his workers by the number of hours worked. Where are the details of wages?" and stated further:

Plaintiffs who bring actions for substantial damages must prove their damage. They cannot simply write down figures and assert that this is their loss and expect the court to grant those damages or loss. They have to prove their loss. The court looks at the circumstances and the nature of the case and if greater details are warranted, the court will insist on that: Bonham Carter v. Hyde Park Hotel – (1938) 6 TLR 177; Ratcliffe v. Evans – (1986) 2 QB 524 at 532.

There are situations where assessment of damages is largely speculative but the court does its best to arrive at a figure if it is satisfied that real damage has been suffered. Loss of chance is an incident of such cases.

This is not a case where I can speculate in the absence of any detail even as to the number of extra hours of work and the hourly rate for the painters. This type of detail should have been provided to the court. The painter who painted the building could easily have been called to give his rate of pay

Someone from the Bank could have been called to show how much was paid by progress payments by the Bank. Even the quotation which he gave to the owner setting out the contract price was not produced to the court. Alternatively the plaintiff could have produced his own bank statements to prove the total sum he received from the owner and the shortfall...(emphasis added)

20. In my judgment, the claim for \$ 157,000.00 was not established and is declined.
21. The plaintiff claims that his business suffered financial loss in a sum of \$ 507,000.00. He found it difficult to re-engage in his construction business, as his financial credit rate with financiers had been affected. The statement of claim pleads the following particulars of financial losses.
- (i) *The Plaintiff constructions business under Khan's Constructions had temporary closed for business due to financial loss for non-payment of contract work at \$157,000 by the Defendant.*
 - (ii) *The Plaintiff's labourers had been laid-off.*
 - (iii) *The Plaintiff's major building contract works were put on hold amounting to \$350,000 due to financial loss caused by the Defendant.*
 - (iv) *The Plaintiff with its financial losses was not in any position to submit his tender for any further construction works.*
 - (v) *Loss of income due to the Defendant failure to pay the balance sum of \$157,000.*
22. In the light of my finding that the plaintiff has not established his claim for \$ 157,000.00, the claim for consequential financial loss, in respect of which no evidence was given, also fails.

23. *Orders*

- a. The plaintiff's claim is declined.
- b. The plaintiff shall pay the defendant costs summarily assessed in a sum of \$2000.



A.L.B. Brito-Mutunayagam

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JUDGE

23rd October, 2020