

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. 54 of 2020

BETWEEN : **BASHEER KHAN aka BASHIR KHAN**

PLAINTIFF

AND : **CARPENTERS FIJI PTE LIMITED**

DEFENDANT

BEFORE : Javed Mansoor, J

COUNSEL : Mr. S. Valenitabua for the plaintiff

: Mr. N. Lal for the defendant

Date of Hearing : 11 March 2021

Date of Decision : 22 August 2022

DECISION

PRACTICE & PROCEDURE

Originating summons – Application to strike out – Whether originating summons proper mode to have commenced action – Order 18 rule 18 (1) & Order 28 rule 9 of the High Court Rules 1988

1. The plaintiff filed originating summons in the expedited form. The declarations and orders he sought are reproduced below:
 - a. “A declaration that the defendant, Carpenters Fiji Pte Limited, is contractually obliged to pay the plaintiff 19 months rental as compensation for early termination of a Memorandum of Agreement made on 1 February 2019 (hereinafter referred to as “the said Agreement”) pursuant to clause 1.1 of the said Agreement totaling \$41,420.00 (Forty-One Thousand Four Hundred Twenty dollars).
 - b. A declaration that the defendant breached clause 1.1 of the said Agreement causing loss, special damage and general damage to be assessed, to the plaintiff.
 - c. An order that the defendant pays the plaintiff \$41,420.00 as special damages being compensation for early termination of the said Agreement and general damages to be assessed for breach of contract.
 - d. An order that the defendant pays the plaintiff further \$29,799.00 (Twenty-Nine Thousand Seven Hundred Ninety-Nine dollars) being special damages for the repair of the defendant’s rented space post-termination as more accurately particularized in the affidavit in support filed herewith.
 - e. An order that the defendant pays all the costs of these proceedings to the plaintiff on an indemnity basis within a prescribed period.
 - f. Any other order, declaration and relief as seems just and equitable by this honorable court”.

2. The defendant filed an affidavit in opposition and summons to strike out the plaintiff's action on 30 October 2020. The application to strike out was on the basis that the action discloses no reasonable cause of action, that the action is frivolous and vexatious, that it may prejudice, embarrass or delay the fair trial of the action and that it is otherwise an abuse of the process of the court. The summons to strike out set out three grounds which are also stated in the affidavit in opposition filed on behalf of the defendant by its director, Daniel Kingston Whippy.
3. The court took up for hearing the strike out application as well as the substantive dispute. Counsel for both parties made oral submissions. The defendant filed written submissions. Counsel for the plaintiff submitted that he would not be filing submissions.
4. The dispute mainly relates to the meaning of certain provisions of a letting agreement that the parties entered into on 1 February 2019 for a term of three years. The agreement gave the defendant the right to renew the lease for a further two terms of three years each. The first term was to expire on 31 January 2022.
5. However, the defendant terminated the agreement on 7 July 2020.
6. The plaintiff's contention is that the defendant must pay the aggregate balance rent of \$41,420.00 for the remaining period of 19 months of the first term ending on 31 January 2022 in terms of clause 1.1 of the agreement. This is computed on the basis of the monthly rent of \$2000.00 plus Value Added Tax (VAT), totaling \$2180.00. The plaintiff also claimed expenses to restore the premises to its previous condition.
7. The defendant relied on clause 10.5 (b) to justify termination of the letting agreement and to deny the plaintiff's claim. Clause 10.5 (b) is stated below:

DEFAULTS, TERMINATION ETC

“(b) That notwithstanding anything to the contrary herein contained the Lessee shall have the right to terminate the Lease at six (6) months' notice to the Lessor of its intention to do so.”

8. The plaintiff's position is that notwithstanding clause 10.5 (b), if the agreement is terminated within the first term, which was to run until 31 January 2022, clause 1.1 would take effect and a liquidated sum would become payable to the plaintiff.
9. Clause 1.1 of the agreement states:

"The parties agree that the Term of this Agreement shall be 3 years with the right of renewal granted to the Lessee for a further two (2) terms of three (3) years each. In the event a Party terminating this Agreement prior to the completion of the First Term, the terminating Party shall compensate the Other Party the amount equivalent to the Monthly Rental payable for the balance of the first term."
10. The plaintiff submitted that the defendant gave notice of termination of the lease by letter dated 7 July 2022 prior to completion of the first term and that, therefore, in accordance with the above clause, rent for the balance period of 19 months was payable.
11. The plaintiff also made claims for repair work to the premises that the defendant had occupied. The plaintiff said he accepted an offer to carry out repair work for \$19,839.50, and obtained a quotation for \$9,960.00 to remove glass and aluminum installed by the defendant.
12. The defendant's director averred that the defendant had advised the plaintiff that business was extremely difficult due to the Covid 19 pandemic. Thereafter, the defendant wrote to the plaintiff on 7 July 2020 saying that it wished to cease operations at the property taken on rent. The defendant made reference to clause 10.5 (b) of the agreement, and gave notice of six months, effective from 7 July 2020. The defendant intimated it would vacate the premises by 30 September 2020. In lieu of the balance notice period, the defendant agreed to pay rent until 7 January 2021.
13. According to the defendant, the plaintiff responded by letter dated 17 August 2020, and called upon the defendant to pay \$50,140.00. Lawyers for the defendant replied denying any breach of the letting agreement and stated that the defendant was entitled to have invoked clause 10.5 (b) of the agreement. They reiterated that

the defendant would vacate the premises on 30 September 2020, and pay rent up to January 2021.

14. Mr. Whippy said that the plaintiff had misconstrued clause 1.1 of the memorandum of agreement. According to him clause 10.5 (b) means “despite any terms that may conflict with the present provisions or statement and/or despite what was previously indicated, the referenced contractual provision supersedes any other provision of the contract on the same subject or potentially conflicting in essence”.
15. Mr. Whippy said that the defendant has fully paid up all its rent under the agreement. He disputed the quotation for repair of the premises. He said that the plaintiff had failed to facilitate the joint inspection of the premises at a date and time agreed by both parties when the premises was to be handed over to the plaintiff.

Strike out application

16. The defendant submitted that the affidavits of the parties contain matters of dispute, and that there is a need to go through a trial to adjudicate the dispute. The defendant submitted that the plaintiff has not given particulars to identify the cause of action, but has only stated the reliefs that are sought. The defendant submitted that the issue between the parties is not the construction of an Act or some other question of law or contract.
17. The plaintiff’s case is that in terms of clause 1.1, he must be compensated for the defendant’s early termination of the lease by payment of the liquidated sum provided by the agreement. This involves the construction of two provisions of the letting agreement. The particulars stated by the plaintiff in his originating summons supported by his affidavit is sufficient, in my view, to disclose the cause of action against the defendant. Strike out applications rarely succeed, as a matter of policy, and in this case, on the face of it, the court sees no reason to strike out the action. The defendant has not established any of the grounds stated in Order 18 rule 18 (1) of the High Court Rules to strike out the plaintiff’s action.

Dispute related to meaning of contractual provisions

18. The substantive dispute is mainly to do with the construction of clauses 1.1 and 10.5 (b) of the agreement. The court does not see much difficulty in adjudicating the matter. However, the plaintiff is also claiming certain sums to bring the premises to its previous state and has relied upon certain quotations from service providers. These are resisted by the defendant, saying that the claims are excessive. In regard to the additional claims, it may be appropriate to hear the evidence of the parties in regard to these claims. As the matter will be set for hearing, the parties may lead evidence related to the material provisions of the agreement. Therefore, the court is of the view that this action should proceed as if it were filed as a writ as permitted by Order 28 rule 9 of the High Court Rules. The affidavits filed by the parties can be taken as pleadings.

ORDER

- A. The defendant's summons to strike out filed on 30 October 2020 is struck out
- B. The plaintiff's action will continue as though it was filed as a writ of summons.
- C. The affidavits filed by the parties will be considered as pleadings. The remaining steps are to be taken in terms of the High Court Rules 1988.
- D. The defendant is to pay the plaintiff costs summarily assessed in a sum of \$500.00 within 21 days of this decision.

Delivered at **Suva** on this **22nd** day of **August, 2022**



M. Javed Mansoor
Judge