

IN THE HIGH COURT OF THE REPUBLIC OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 123 OF 2013

BETWEEN : **ADRIN BOYD SOFIELD AND CAROL MARY SOFIELD**
both of House No. 8 Tanoa Residence, Votualevu, Nadi in
the Fiji Islands, Businessman and Businesswoman
respectively.

PLAINTIFF

AND : **NAFIZ ALI** of 34 Belo Street, Samabula, Suva, Fiji
Islands

DEFENDANT

Counsels:

Mr Vakacakau for the Plaintiffs

Mr W Pillai for the Defendant

Date of Hearing : 31 March 2014

Date of Judgment : 27 May 2014

J U D G M E N T

Introduction

[01] This is an application filed by Adrian Boyd Sofield and Carol Mary Sofield, plaintiffs for summary judgment (“the application”). The application is supported by an affidavit of Adrian Boyd Sofield. The application is made pursuant to Ord. 14 of the High Court Rules 1988 (“the HCR”).

[02] Defendant filed an affidavit in opposition to resist the application.

[03] The plaintiff filed affidavit in reply to the defendant's affidavit in opposition.

Background

[04] The plaintiffs were the owners of the property located at 2 Jalil Drive, Waqadra in Nadi. Bayleys Real Estate Ltd (BRE) was instructed by the plaintiffs to secure a purchaser for the property. In April 2013 the plaintiffs as the sellers and the defendant as the purchaser entered into a sale and purchase agreement for the property ("the Agreement"). It was agreed that the purchase price would be \$600,000 and a non-refundable deposit of \$10,000 was to be paid into BRS trust account. The transfer document executed twice due to the defendant's solicitor misplacing the first transfer document. The defendant has allegedly lodged the transfer for stamping. The defendant asked for the Engineers Certificate ("the EC") on the property. The BRS advised the defendant that ANZ had misplaced it and he would have to pay for another one to be made. The plaintiff failed to provide the EC. In June 2013 the defendant through his solicitors sent a notice to terminate the agreement. The plaintiff responded and told that the plaintiffs were not obliged to provide the EC and Building Plan ("the BP") and advised the deposit will not be refunded. In June 2013 the plaintiffs' solicitors advised the defendant that in the first agreement the plaintiffs were not obliged to provide an EC or BP and that if the defendant did not meet his obligation by 18 June 2013 the plaintiffs will seek specific performance. The defendant by letter dated 20 June 2013 intimated the plaintiffs' solicitors that he had terminated the agreement. By that letter the defendant advised the plaintiffs that the defendant had based the termination on an implied agreement that the EC and the BP would be provided and in the absence of the same [the defendant] was entitled to terminate the agreement and sought the refund of the deposit. The plaintiffs informed the defendant that they accepted termination but will sue for breach of contract. In

July 2013 the plaintiff instituted this action against the defendant for damages but not for specific performance. The defendant unilaterally placed a caveat on the property after terminating the agreement. It was later removed by the court upon the plaintiffs paying the deposit of \$10,000 into court. The property was subsequently sold to a third party for the same amount-purchase price but with a deposit of \$60,000. A default judgment on the counterclaim was entered against the plaintiffs, which was subsequently set aside and the plaintiffs were allowed to file and serve a reply to defence and defence to the counterclaim.

The issue

[05] There are two issues to be determined by the court in this case. They are:

- (i) Does the defendant have a reasonable defence?
- (ii) Are the plaintiffs entitled to summary judgment?

[06] If I answer the first issue affirmatively, then the plaintiffs will not be entitled to summary judgment. As a result the application for summary judgment will be dismissed and struck out.

The Law

[07] The Plaintiff may, under HCR O.14 r.1, apply for summary judgment against the Defendant on the ground that the Defendant has no defence to a claim. HCR O.14 deals with summary judgment. O.14 r.1 provides that:

*“1.-(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, **on the ground that that defendant has no defence to a claim included in the writ**, or particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the court for judgment against that defendant.*”

(2) ...

(3) ... (*Emphasis added*).

[08] Pursuant to HCR O. 14 r.3 the Plaintiff may obtain judgment against the Defendant on the claim or part as may be just. O.14 r.3 states that:

*“3.-(1) **Unless** on the hearing of an application under rule 1, either the Court dismisses the application or **the defendant satisfies the Court with respect to the claim or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried** or there ought for some other reasons to be a trial of that claim or part, **the Court may give such judgment for the plaintiff against that defendant on that claim or part** as may be just having regard to the nature of the remedy or relief claim”* (*Emphasis added*).

Arguments

[09] Mr Vakacakau, counsel for the plaintiffs argued that the defendant has not shown any reasonable defence against the plaintiffs for unlawfully terminating unconditional agreement. He went on to argue that the defendant does not have a claim or defence to claim back the non-refundable deposit after he had agreed and executed the agreement, for Clause 5.1 (e) of the agreement only applies on settlement or a settlement date that is mutually agreed to by both parties which in this case does not apply as the settlement stage had not been reached yet. He further contended that it was clear that Clause 5.1 (e) does not apply as the property has been sold to a third party without the need of the EC and the BP. Mr Vakacakau cited number of case authorities to substantiate his argument, i.e. **Carpenters Fiji Ltd v Joes Farm Produce Ltd, Kapoor v Rajan Builders Ltd [2012] FJHC 1179; HBC171.2009 (26 June 2012), Engineer Procure Construction Fiji Ltd v Sigatoka Electrical Ltd [2013] FJHC 603; HBC150.2011 (13 November 2013); Fiji Development Bank v Dayal [2013] FJHC 513; HBC183.2010 (7**

October 2013) &Giesbrecht v Cross [2013] FJHC 699; HBC540.2007 (7 June 2013).

[10] In contrast, Mr Pillay counsel for the defendant argued that there was an implied agreement that the EC and the BP would be provided and in the absence of the same the defendant was entitled to terminate the agreement and seek the refund of the deposit. He cited the case authority of **Carpenters Fiji Ltd v Joes Farm Produce Ltd** [2006] FJCA 60; ABU0019U.2006S (10 November 2006). It seems both parties rely on Carpenters' case.

Determination

[11] Firstly I will deal with the issue that whether the defendant has a reasonable defence to the claim included in the writ. Ord. 14, r.1(1) permits the plaintiffs to apply for summary judgment on the ground that the defendant has no defence to the claim included in the writ after the defendant has given his notice of intention to defend the action upon service of the statement of claim.

[12] The plaintiffs' claim is stemmed from breach of contract. The parties entered into a sale and purchase agreement for the property. According to the agreement the defendant agreed to purchase the property for the purchase price of \$600,000 and to pay a non-refundable deposit of \$10,000 in the BRE's (property agent of the plaintiffs) trust account. The defendant declined to sign the transfer documents and demanded for the EC and the BP. The plaintiffs told that, ANZ has misplaced the EC and the defendant has to pay for another copy. The defendant told, there was an implied condition that the plaintiffs will provide the EC and the BP. The plaintiffs claimed that the agreement was unconditional devoid of any condition implied or otherwise. This resulted in the termination of the agreement by the defendant.

[13] Fiji Court of Appeal in **Carpenters Fiji Ltd v Joes Farm Produce Ltd** (supra), a case relied on by both parties, set out the well-established

principles relating to the entry of summary judgment under para 21 as follows:

- (a) *"The purpose of 0.14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up, a bona fide defence or raise an issue against the claim which ought to be tried.*
- (b) *The defendant may show cause against a plaintiff claim on the merits e.g. that he has a good defence to the claim on the merits or there is a dispute as to the facts which sought to be tried or there is a difficult point of law involved.*
- (c) *It is generally incumbent on a defendant resisting summary judgment, to file an affidavit which deals specifically with the plaintiff's claim and affidavit and states clearly and precisely what the defence is and what facts are relied on to support it.*
- (d) *Set off, which is a monetary cross claim for a debt due from the plaintiff, is a defence. A defendant is entitled to unconditional leave to defend up to the amount of the set off claimed. If there is a set off at all, each claim goes against the other and either extinguishes or reduces it Hanak v Green (1958) 2 QB 9 at page 29 per Sellers LJ.*
- (e) ***Likewise where a defendant sets up a bona fide counter claim arising out of the same subject matter of the action, and connected with the grounds of defence, the order should not be for judgment on the claim subject to a stay of execution pending the trial of the counter claim but should be for unconditional leave to defend even if the defendant admits whole or part of the claim. Morgan and Son Ltd -v- Martin Johnson Co (1949) 1 K 107(CA).***

See 1991 The Supreme Practice Vol 1 especially at pages 146, 147, 152 and 322." (Emphasis added).

[14] The defendant has filed an affidavit to resist summary judgment and states that the plaintiffs were under obligation to provide the requested EC and the BP in terms of an implied condition. He has related facts to his defence and counterclaim.

[15] According to the plaintiffs there was no condition imposed in the agreement to provide the EC and/or BP. Cl. 1.1 of the agreement states that:

“The Vendor will sell and the purchaser will purchase the said property for the price and subject to the terms and conditions hereinafter appearing.”

[16] It was submitted on behalf of the plaintiffs that the contract stated the terms of the contract, but there was at all times no mention of the EC and/or BP. In this regard the parties had exchanged correspondences. It is pertinent to know what parties exchanged through their correspondences.

[17] Messrs O’Driscoll & Co, the defendant’s former solicitors sent a letter to the plaintiffs’ solicitors on 14 June 2013 in the following terms:

“Kindly take note that your client has failed to provide our client with the Engineering Certificate and Plans for Dwelling in respect of the above property when he had requested them more than fourteen days ago. This would have been even prior to execution of Sale & Purchase Agreement and our client had expected to receive before now.

We are of the view that your client has breached the Contract by failing to provide the material documents and therefore in terms of clause 11 we have been instructed by our client to terminate the Agreement effective immediately.

Our client has also instructed that his deposit of \$10,000.00 should be returned in full without any deductions.

Once our client is satisfied that all matters are complied with, he may be willing to enter into a fresh agreement with your client on re-negotiated terms. Finance is in place.

Your attention to the refund of deposit will be appreciated.

Kindly take note accordingly.

*Yours faithfully
O’Driscoll & Co”*

[18] On the same day the plaintiffs’ solicitors responded to that letter in these words:

“We refer to your “Notice of Termination” letter of even date (the Notice).

The sale and purchase agreement was unconditional. Our client was not obliged under the agreement to provide an engineering certificate or building plans before settlement or at anytime. Your client cannot terminate the agreement on the grounds contained in the Notice.

We are awaiting instructions from our clients and will respond to your Notice in due course. Obviously our clients must elect to either to accept or reject your client's repudiation. Whatever our clients decision you may advise your client that he will not be getting his deposit back.

Yours faithfully

Peter Allan Lowing OBE"

- [19] On 17 June 2013 the plaintiffs' solicitors again wrote to the defendant's solicitors. That letter stated:

"We refer to your letter dated 14 June 2013.

We note the reason given for your client's decision to repudiate his obligations under the agreement.

With respect the provisions of the agreement do not contemplate expressly or implied the obligation to provide an engineering certificate and plans for the dwelling. We would ask that your client reconsider his position. Unless we are advised by close of business 18 June 2013 that your client intends to meet his obligations we have instructions to seek specific performance of the agreement.

Yours faithfully

Peter Allan Lowing OBE"

- [20] The defendant wanted the EC and the BP as these documents were required by his bank as part of its loan process. The BRS through its letter dated 20th June 2013 ("ABS-13") to O'Driscoll & Co (the defendant's former solicitors) explaining the situation in the following terms:

*"This office then advised your client Nafiz Ali of this position and also advised that under the circumstances **he needed to obtain and pay for a new Engineer's Certificate as there was no condition in the Agreement in respect of this being provided by the Vendor.***

Please be advised that the **request for a copy of a current Engineers Certificate for the property came after the execution of the Agreement for Sale and Purchase dated 9th April 2013.**”(Emphasis added).

[21] In the statement of defence under para 4 the defendant states:

“... The defendant denies that he refused to complete the agreement and says that these attempts to do so were frustrated by the plaintiffs’ not supplying the documentation that the defendant had been assured the plaintiffs had even before he signed the agreement for sale and purchase”.

[22] Most importantly, the plaintiffs later forwarded a letter dated 13 September 2013 (annexed to the further supplemental affidavit in support of the summary judgment as “SC-2”) to the defendant’ solicitors accepting the termination and suing for breach of contract. That letter reads thus:

“We refer to our previous correspondences.

So there is no doubt as to our client’s position, **your client’s termination of the contract was accepted by our clients who later entered into another sale and purchase agreement with a new purchaser.**

...”

[23] Initially, the plaintiffs wanted to seek specific performance against the defendant. Later, after entering into another agreement for the same purchase price of \$600,000 with new buyer, the plaintiffs confined their claim to that of breach of contract on the part of the defendant. The property now has been sold to a third party. Apparently, the plaintiff could not seek specific performance in the circumstance. The defendant’s termination of the agreement restored the plaintiffs’ liberty to deal with the property as they wish.

[24] Now, a new issue would emerge. That is whether the termination is mutual or unilateral. The plaintiffs still seem to maintain that the termination of the agreement is unilateral and unlawful. Logically, one

cannot argue, after accepting the termination by the other party, that the termination was unilateral and unlawful. I would provisionally say there cannot be unilateral termination after accepting the termination announced by the other party.

- [25] The defendant relying on Cl. 5.1 (e) of the agreement, states that there was an implied condition to provide the EC and the BP. That clause provides:

“On the date of settlement or such other date as may be mutually agreed in writing by the parties, the following inter alia, shall take place.

- (e) ***The parties shall complete such other ancillary and consequential matters as is reasonably, necessary in conveyancing in Fiji in relation to transactions as that herein”***

- [26] On behalf of the defendant it was submitted that under Cl.5.1 (e) of the Agreement the plaintiffs were impliedly obliged to provide the EC and the BP. Conversely, it was contended on behalf of the plaintiffs that the above clause only applies on the date of settlement or a date mutually agreed in writing by the parties.

- [27] Whether the requested documents by the defendant namely the EC and the BP are reasonably necessary in conveyancing in Fiji, in my opinion, is a question of law which must be decided at trial. Furthermore, the issue whether there was an implied condition that the plaintiffs will provide the EC and the BP or the agreement was unconditional as alleged by the plaintiffs, is a question of fact that, in my opinion, must be decided at trial after evidence being adduced by both parties.

- [28] In **Kapoor V Rajen Builder Ltd** (supra) Master Deepthi Amaratunga (as he then was) dismissed the application for summary judgment stating that, this is an action that needs oral testimony of the plaintiff in order to ascertain the liability of the defendant.

[29] The issues as to whether there was an implied condition to provide for the EC and the BP and as to whether failure to provide those documents by the plaintiffs on time under the contract necessarily amounted to a repudiatory breach of contract entitling the defendant to terminate the contract are real triable issues.

[30] The plaintiff cited the case of **Engineer Procure Construction Ltd v Sigatoka Electric Ltd**. That case will not be of assistance to the plaintiffs. In that case I entered summary judgment in favour of the plaintiff on the basis that the defendant had failed to establish a bona fide defence which has real prospect of success. The facts of that case are different from that of the case at hand. In that case there was no counterclaim by the defendant.

Counterclaim

[31] In this case the defendant has made a counterclaim against the plaintiffs in the sum of \$10,000, being the deposit the defendant paid under the contract. In his counterclaim the defendant states that there contract was frustrated by the plaintiffs and that he is entitled to get his deposit refunded. It appears to me that the defendant has set up a bona fide counterclaim out of the same subject matter of the action. In **Carpenter's case** (supra) the Fiji Court of Appeal held that, where a defendant sets up bona fide counterclaim arising out of the same subject matter of the action, and connected with the grounds of defence, the order should not be judgment on the claim subject to a stay of execution pending the trial of the counterclaim but should be for unconditional leave to defend, even if the defendant admits the whole or part of the claim. In the current case the defendant has set out a bona fide counterclaim arising out of the contract, the subject matter of the action and that counterclaim is connected with his grounds of defence. Therefore the defendant must be give unconditional leave to defend.

Conclusion

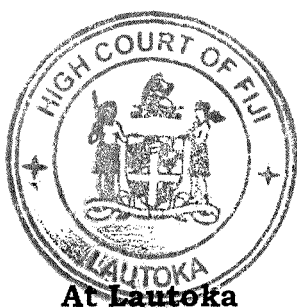
[32] I am satisfied that the defendant has a good defence to the claim on merits and that there is an issue or question in dispute which ought to be tried. I am also satisfied that there is a point of law (though not difficult) involved in this action. In addition, the defendant has set out a bona fide counterclaim arising out of the same subject matter, and connected with the grounds of defence.

[33] I answer the issues raised as follows: (i) yes; (ii) no.

[34] For the foregoing reasons, I will refuse summary judgment with summarily assessed costs of \$750.00 which is payable to the defendant by the plaintiffs in 21 days.

Final outcome

- (i) Plaintiffs' application for summary judgment is refused with the summarily assessed costs of \$750.00 payable to the defendant by the plaintiffs within 21 days;
- (ii) Order accordingly.



27/05/14

Solicitors:

Messrs Lowing & Associates, Barristers & Solicitors for the plaintiffs

Messrs Gordon & Co, Barristers & Solicitors for the defendant

M H Mohamed Ajmeer

.....
M H Mohamed Ajmeer
A/Master of the High Court