

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 117 OF 2010

BETWEEN : **GYAN SINGH** (father's name Pratap Singh) of 5 Houn
Street, Suva, Fiji, Businessman

1st Plaintiff

: **RAKESH SINGH** (father's name Ajit Singh) of Yalalevu,
Ba, Driver.

2nd Plaintiff

AND : **RONIL PARWESH CHAND**(father's name Pravesh Chand)
of Teidamu, Lautoka

1st Defendant

AND : **SIMON GOPAL** (father's name and occupation unknown
to the Plaintiff)

2nd Defendant

AND : **SUBHASH CHANDRA** (father's name not known to the
Second Defendant) of Lautoka.

Third Party

Before : Master H. Robinson

Appearances

Mr. Sharma of Neel Shivam Lawyers for the Plaintiff/applicant

Ms. Narayan for the 2nd Defendant

Date of Hearing : 18 September 2014

Date of Ruling : 9 October 2014

R U L I N G

Introduction

[1] The Plaintiff by motion dated 19 March 2014 sought from the Court the following Orders:-

1. *An Order that the third party proceedings instituted by the Second Defendant Simon Gopal including any notices made thereto be set aside.*
2. *That the costs of and incidental to this application be costs in the cause.*
3. *Such further and/or other reliefs or Orders as this Honourable Court may deem just and expedient.*

[2] The application is made pursuant to Order 16 rule 6 of the High Court Rules and the inherent jurisdiction of the Court. The application was further supported by an affidavit sworn by the 2nd Plaintiff on 6 March 2014. The affidavit refers to the following facts as the basis for the application.

[3] The first fact is that after the statement of claim was served on the 2nd Defendant, the 2nd Defendant then served my solicitors with a *third party notice* in which he added one *Subhas Chandra* as the third party to indemnify him from any damages claimed. The 2nd Defendant then filed a defence and a claim against the *third party*. From the 25 May 2011 when the 2nd Defendant filed its defence and claim against the third party, he has not taken any steps in the matter despite his solicitor's office informing them of the delay. That the matter has been stagnant since then and that the 2nd Defendant has not taken any steps to obtain further directions from the court against the third party. Therefore the

2nd Defendant is not interested in proceeding with the matter and is delaying it unnecessarily.

[4] The 2nd Defendant objects to the application and filed an affidavit deposed by the 2nd Defendant on the 22 May 2014 which states briefly the following. Firstly that the *third party* has not served a statement of defence to the 2nd defendant's claim hence there is no need for a summons for direction. Secondly we have offered to settle the matter but this was refused and my solicitors had asked them how they intend to proceed with the matter. Thirdly the 2nd Defendants admits that the matter has been stagnant for a while but deny that it is responsible for this situation but that the plaintiff has not taken any further steps to prosecute their claim. The 2nd Defendant further denies that it is trying to prolong the case and wants to have the matter resolved as soon as possible, and it appears that the plaintiff blaming their lack of prosecution on him and the third party.

[5] At the hearing of the matter the applicant provided written submissions whilst the 2nd Defendant was of the view that it was not necessary for her to file any written submissions.

Determination

[6] Order 16 rule 6 on which the application is based states that: -

Proceedings on a third party notice may at any stage of the proceedings, be set aside by the Court.

[7] There are two instances in which the Court may dismiss third party proceedings and they are firstly at the initial stage when an application to issue third party proceedings is made under rule 1 and secondly under this rule (rule 6). Usually the application can be made at any state of the proceedings and only in very exceptional circumstances at the trial.

[8] The applicant/plaintiff in this instance files the application based on the fact that the 2nd Defendant has not done anything to move the matter after the service on the third party of the claim against it, particularly third party directions. The 2nd defendant on the other hand states that fact that it has filed for third party directions does not stop the plaintiff from pursuing its claim against it. It appears to the Court that what the plaintiff requires is a direction on how to proceed further under the circumstances. There are other considerations which come into play once a third party claim has been made. The first is that the third party is now in a similar position as the defendant who included him in the proceedings, he can now defend and also counter claim. Hence if the third party does not give any notice of its intention to defend or fails to file a defence when ordered to do so, the rules and general principles against a normal defendant applies. Under order 16 rule 5 these failures by the third party has the following consequences; *(he) shall be deemed to admit any claim stated in the third party notice and shall be bound by any judgment (including judgment by consent) or decision in the action in so far as it is relevant to any claim, question or issue stated in the notice; and the defendant by whom the third party notice was issued may, if judgment in default is given against him in the action, at any time after satisfaction of that judgment and, with the leave of the Court, before satisfaction thereof, enter judgment against the third party in respect of any contribution or indemnity claimed in the notice, and, with the leave of the Court, in respect of any other relief or remedy claimed therein.*

[9] At this stage of the proceedings the third party has not complied with the rules notwithstanding that he was served on the 25 May 2011 with the third party notice and the 2nd Defendant's defence, therefore rule 5 applies. The 2nd Defendant should therefore under rule 5 sub-rule 2 make an application by summons seeking an order for judgment against the third party.

- [10] In the above scenario there is no need for third party directions. Third party directions are only given where the third party has given notice to defend or has filed a defence and/or counterclaim. The 2nd Defendant should as stated above file a summons seeking judgement against the third party.
- [11] The plaintiff given the above scenario should continue his actions against the defendants and proceed to the filing of a summons for directions. It is still open to the 2nd defendant, after obtaining judgment against the third party, to consent to default judgment against him and still be indemnified under rule 5(1)(a). This is so because the third party shall be deemed to admit the claim against him including judgment by consent. This appears to be the best option. The plaintiff's problem arose from the inaction of the 2nd defendant given the fact that 2nd defendant had not invoked what it was entitled to under rule 5 and the fact that the plaintiff could not obtain default judgment against the third party.
- [12] The plaintiff's application for the Court to order that the third party proceedings to be set aside is of no advantage to his case, on the contrary it could be detrimental to him. In the first instance it matters not to him which party wears the burden of liability as long as one or either of them does. In the second instance an application under Order 16 rule 6 appears to be directed to the parties to the third party notice, that is, the 2nd Defendant and the third party. In this regard I agree with the view of the 2nd defendant that the plaintiff is not prevented from proceeding with the matter even though they had not obtained judgment against the third party, although I do not intend to make any orders for costs against the plaintiff as both parties appear to contribute equally to the delay.

Conclusion

[13] In order to have this matter dealt with expeditiously and given the above scenario I make the following orders.

- (1). The plaintiff's application to set aside the third party proceedings and any notices made thereto is denied;
- (2). The 2nd Defendant is directed to file a summons under order 16 rule 5 (ii) to obtain default judgement against the third party within 7 days;
- (3). The plaintiff is to file summons for direction within 7 days; and
- (4). That costs be in the cause; and the matter adjourned to 20 November 2014 for mention.



At Lautoka

9 October 2014

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Master H Robinson