

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 109 of 2013

BETWEEN : SHARON CECELIA SWANN
FIRST PLAINTIFF

: SHUTAO SUN
SECOND PLAINTIFF

: ANDREW REGINALD SWANN
THIRD PLAINTIFF

AND : JIANG PENG
FIRST DEFENDANT

: YONGSHAN STORE COMPANY LIMITED
SECOND DEFENDANT

AND : SUN INSURANCE COMPANY LIMITED
THIRD PARTY

Civil Action No. 145 of 2013

BETWEEN : LOUSIA THERESA FONG as the Administrator of the ESTATE
OF ANDREA ANTOINETTE SWANN
PLAINTIFF

AND : JIANG PENG
FIRST DEFENDANT

: YONGSHAN STORE COMPANY LIMITED
SECOND DEFENDANT

AND : SUN INSURANCE COMPANY LIMITED
THIRD PARTY

CORAM : The Hon. Mr Justice David Alfred

Counsel : Mr Diven Prasad for the Plaintiffs
Mr R K Naidu for the Defendants
Mr T Tuitoga for the Third Party

Date of Hearing : 21 July 2016

Date of Decision : 25 July 2016

DECISION

1. This is the Third Party's Summons to stay the consolidated action and to vacate the hearing dates pending the hearing and determination of the Third Party's Civil Appeal No. ABU 0055 of 2016.
2. The Third Party is relying on Order 4 rule 2, Order 35 rule 3 and Order 45 rule 10 of the Rules of the High Court and upon the inherent jurisdiction of the Court.
3. The Summons is supported by the affidavit of one, Thomas Naua (Naua) the claims manager of the Third Party (Sun). In this he states that Sun filed an originating summons on 27 June 2013 seeking, inter-alia, the following orders:
 - (i) A Declaration that Sun is entitled to avoid liability to provide indemnity to the Defendants in respect of the claims of the Plaintiffs, on the grounds that the First Defendant was under the influence of alcohol at the material time.
 - (ii) A Declaration that Sun is not liable to satisfy any judgment that may be entered against the Defendants arising out of the said accident being the subject of the above consolidated actions and/or any further or other action that may be issued relating to the aforesaid accident.
 - (iii) That the Declarations sought in paras (i) and (ii) above be determined as a preliminary issue before the substantive hearing of the consolidated action.

4. Sun's Originating Summons was duly heard and a Decision delivered on 10 May 2016, wherein I dismissed the Originating Summons and held Sun is liable to satisfy any judgment entered against the Defendants herein and any other further or other action relating to the said accident.
5. Sun therefore seeks the consolidated action be stayed pending the hearing and determination of the said Appeal as "Sun is of the view the issue of indemnity of the Defendants in this action should be resolved in the first instance."
6. At the hearing of the Summons, Counsel for the Third Party (Sun) provided a written submissions and authorities. He said it was at the discretion of the court whether to stay the proceedings. It would cause greater harm to Sun if a stay was not granted, although he conceded there would thereby be prejudice and some harm to the Plaintiffs. Sun had asked for the Declaration matter to be heard first.
7. Counsel for the Plaintiffs now submitted. He also provided a written submission and an authority. He said a stay application is premature. He also said Naua had never said anywhere in his affidavit that Sun will be prejudiced by the case going on.
8. Counsel for the Defendants then submitted. He said a stay of proceeding is different from a stay of execution. All the authorities cited by the Third Party's Counsel refer to stay of execution except the case of Khan and Ali. The Court does not have to look at the merits of the appeal to decide whether the trial should proceed. There were no circumstances to warrant a stay. The outcome of this hearing could not be prejudged as liability and quantum had not been decided. Whether Sun takes over the defence or not is irrelevant.
9. The Third Party's Counsel in his reply said the special circumstance here is how the Court of Appeal will decide. In answer to the Court, he said he did not have any case on this point.

10. At the conclusion of the hearing I informed I would take time for consideration. Having perused the written submissions, the affidavit and the cases cited on both sides I now deliver my decision.
11. At the outset, I observe that the issue arising for my decision herein is a novel one and no authorities have been cited to me from any Commonwealth country for me to consider in arriving at my decision.
12. This, however, has not prevented me from discerning the real issue here. It is not a stay of execution nor is it a stay of proceedings. It is at bottom an attempt by a Third Party to stop the trial of actions by Plaintiffs against Defendants, on the ostensible grounds of an appeal in another proceedings.
13. The words of the Supreme Court Practice 1995 (The White Book) are instructive. At 16/1/ on page 255, it states that it should be observed that third party proceedings have a life of their own, quite independent of the main action so that if the main action is settled, third party proceedings already begun, can still proceed. Indeed, generally speaking, a defendant and a third party stand in relation to one another as if the defendant had brought a separate action against the third party.
14. I consider the authorities cited by Counsel for the Third Party are distinguishable and do not help it.
15. If I may say so, the words of Amaratunga J in para 24 of his Judgment in *Mohammed Wahid Khan Plaintiff And Mohammed Yasad Ali ... Defendant*, Civil Action No. HBC 21 of 2013, a case cited by the Counsel for the Third Party, best describes the Third Party's Summons here. My brother said "The Defendant seeks to change the existing law and the Plaintiff cannot be asked to wait till he exhausts all his avenues up to the Supreme Court." He therefore refused to grant a stay of the proceedings.

16. A judge must not be unable to see the wood for the trees. The Third Party's liability only arises if and after the Plaintiffs have succeeded in their claims against the Defendants and only if and after the Third Party is held liable to indemnify the Defendants against any amounts found due from them to the Plaintiffs. At this juncture none of these events have taken place.
17. In other words, there is nothing to stay as the Third Party has not been found liable to pay any amount and therefore proceeding to hear the consolidated action does not and cannot render the outcome of any appeal nugatory.
18. I am therefore of opinion that the Third Party is not entitled to stay the speedy hearing of the Plaintiffs' claims herein arising from an accident on 23 December 2012 more than 3½ years ago, while the Third Party, which was not brought in by the Plaintiffs awaits the outcome of an appeal brought by it in another court proceedings.
19. I therefore dismiss the Summons, to Stay the consolidated action and to vacate the hearing dates, with costs which I summarily assess and order to be paid by the Third Party to the Plaintiffs in the sum of \$450.00 and to the Defendants in the sum of \$450.00 making a total of \$900.00.

Delivered at Suva this 25th day of July 2016.



David Alfred
JUDGE
High Court, Fiji