IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

Civil Action No. HBC 221 of 2016.

BETWEEN : **TAGRA SPARE PARTS & CARWASH (FIJI) LIMITED** a limited liability company having its registered office at Lautoka in the Republic of Fiji.

PLAINTIFF

AND : **SAROJINI NARAYAN & VICKY HARISH NARAYAN** both of 34 Ravouvou Street, Lautoka, Property Owners.

DEFENDANT

RULING

BACKGROUND

1. The plaintiff was a tenant of the defendants over some commercial premises situated within the township of Lautoka. At some point last year, the defendants had filed an application pursuant to section 169 of the Land Transfer Act seeking an eviction Order against the plaintiff on the ground of non-payment of rent.
2. At some point after the defendants' section 169 application, the plaintiff would file separate proceedings seeking certain Orders to undermine the section 169 application.
3. At some point after the plaintiff filed their proceedings, both counsel appeared in Court before me and reached a compromise. Pursuant to that, a consent order was entered in Court on 21 October 2016. The related sealed Order is reproduced in full below:

    1. By consent, Defendants agree by their counsel that they will allow the Plaintiff further three (3 months from today to vacate the premises and remove all their possession by 21st of January 2017;
    2. The Plaintiff agrees that it will discontinue this action and forfeit any right of first refusal under contract;

3. The Defendants will withdraw their section 169 application pending before the Master of the High Court
4. The parties agree to work out between themselves on exit of the premises so that Plaintiff does not damage the belongings of the Defendants;
5. Parties to bear their own costs.

4. On 20 January 2017, the plaintiff filed a fresh Writ of Summons seeking to set aside the said consent order. Notably, at the time the plaintiff filed its application, the defendant had already withdrawn its section 169 application as per the consent order. The plaintiff did so after having instructed a new solicitor, Mr. Mohammed of Fazilat Shah Legal. The plaintiff also filed an *ex-parte* Notice of Motion on 20 January 2017 seeking an order that the Consent Order be stayed pending determination of the action or that it be wholly set aside.

EARLIER RULING

5. In my Ruling dated 01 February 2017, I refused and dismissed the plaintiff's said application with costs in the sum of eight hundred dollars only in favour of the defendant.
6. I noted at the outset that a consent order can only be set aside on the same grounds as the court would normally set aside any contract or agreement.
7. I then observed that the only ground upon which the plaintiff was relying to set aside the consent order was in its allegation that the said order was entered into by its former solicitor without his instruction and knowledge. As I had noted:

> 10. The director of the plaintiff company, Mr. Amal Dip Singh, has now filed a fresh action in HBC 09 of 2017 through his new solicitors seeking to set aside the said Consent Order.
> 11. The gist of his argument is that the said Consent Order was entered into by his former solicitors without his instruction and knowledge.
> 12. The thrust of Mr. Mohammed's argument is that not only did his client not authorise his former counsel to consent to settlement of the matter on the terms set out above, but also, that his client would never ever have consented to those terms because his client was interested in purchasing the property and was relying on the right of first refusal therein the Tenancy Agreement.

8. I also observed that the plaintiff is aggrieved because the consent order meant the end of the Tenancy Agreement. The plaintiff had submitted through its solicitor that it (plaintiff company) would never have consented to ending the

Tenancy Agreement as it would mean that it (plaintiff) would have to forfeit its right of first refusal.

9. I then cited some case law which establish that a right of first refusal - unlike an option to purchase which is a proprietary interest - only confers a mere personal right. As such, a right of first refusal is not sufficient to sustain a caveat on the property, and probably will not be sufficient also to support an injunction against the defendants from selling the property.
10. In any event, the plaintiff could not rely on the said right of first refusal (or for that matter, on any term of the Tenancy Agreement) because the Tenancy Agreement which conferred that right, was no more. I came to this conclusion on the view that the consent order was, in effect, a mutual termination by both counsel of the said Agreement.
11. In order to succeed, the plaintiff had to revive the Agreement. To do so, he would have to succeed in setting aside the consent order which more or less terminated that Agreement.
12. The plaintiff's immediate hurdle is getting around the grain of case law authority which establish the position that a counsel who settles a claim on behalf of his client has the apparent general authority to do so and accordingly any consent judgment entered upon the compromise was binding on the client as against the other party.
13. The law of agency recognizes that an agent will have apparent authority, although the principal may not have consented to the agent having such authority, where the principal, by his words or by his conduct, makes a third party to believe that the agent has authority to contract for and on behalf of the principal.

PRELIMINARY ISSUE

14. In his submissions at the hearing, Mr. Mohammed argued that the Writ of Possession was defective because the sealed order was not served personally on the plaintiff. He argued that the sealed order contained a penal notice and as such, it was imperative that it be served on the plaintiff.

15. Mr. Chandar argued that the plaintiff was a registered company and that the sealed order was served on its then solicitors.

16. Order 45 Rule 6(3) provides as follows:

> **Service of copy of judgment, etc., prerequisite to enforcement under rule** 5 (O.45, r.6)
>
> 6.-(1) In this rule references to an order shall be construed as including references to a judgment.
>
> (2) **Subject to Order 24, rule 16(3), Order 26, rule 6(3),** and paragraphs (6) and (7) of this rule, an order shall not be enforced under rule 4 unless-
>
> *(a)* a copy of the order has been served personally on the person required to do or abstain from doing the act in question, and
>
> *(b)* in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.
>
> (3) Subject as aforesaid, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in rule 4(1)(ii) or (iii) unless-
>
> *(a)* a copy of the order has also been served personally on the officer against whose property leave is sought to issue a writ of sequestration or against whom an order of committal is sought, and
>
> *(b)* in the case of an order requiring the body corporate to do an act, the copy has been so served before the expiration of the time within which the body was required to do the act.
>
> (4) There must be indorsed on the copy of an order served under this rule a notice informing the person on whom the copy is served-
>
> *(a)* in the case of service under paragraph (2), that if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it, and
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> *(b)* in the case of service under paragraph (3), that if the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, he is liable to process of execution to compel the body to obey it.
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> (5) With the copy of an order required to be served under this rule, being an order requiring a person to do an act, there must also be served a copy of any order made under Order 3, rule 4, extending or abridging the time for doing the act and, where the first-mentioned order was made under rule 4(3) or 5 of this Order, a copy of the previous order requiring the act to be done.
>
> (6) An order requiring a person to abstain from doing an act may be enforced under rule 4 notwithstanding that service of a copy of the order has not been effected in accordance with this rule if the Court is satisfied that, pending such service, the person against whom or against whose property it is sought to enforce the order has had notice thereof either-
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> *(a)* by being present when the order was made, or
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> *(b)* by being notified of the terms of the order, whether by telephone, telegram or otherwise.
>
> (7) Without prejudice to its powers under Order 65, rule 4, the Court may dispense with service of a copy of an order under this rule if it thinks it just to do so.

17. Order 24 rule 16(3) provides:

> (3) Service on a party's barrister and solicitor of an order for discovery or production of documents made against that party shall be sufficient service to found an application for committal of the party disobeying the order, but the party may show in answer to the application that he had no notice or knowledge of the order.

18. Order 26 Rule 6 (3) provides:

> (3) Service on a party's solicitor of an order to answer interrogatories made against the party shall be sufficient service to found an application for committal of the party disobeying the order, but the party may show in answer to the application that he had no notice or knowledge of the order.

19. I agree that a failure to serve a sealed copy of an Order containing a penal notice is fatal and will render a writ of possession issued subsequent to it, defective. However, when read together, Order 45 rule 6(2) and Order 24 Rule 16(3) and Order 26 Rule 6(3) have the effect of saying that service on a solicitor is sufficient, however, if the solicitor did not then serve the "party", the party is entitled to say that he did not have notice of the sealed Order.

20. There is no evidence before me to show that the solicitor had indeed served the plaintiff which means that the plaintiff is entitled to say he did not have notice of the said Order. Accordingly, the Writ of possession must be dismissed.

CONCLUSION

21. I think the above finding determines the application. The defendants will just have to re-seal the Order and serve it on the plaintiff company and then file a fresh application for leave to issue writ of possession. Parties to bear their own costs.

HIGH COURT OF FIJI LAUTOKA

Anare Tuilevuka
JUDGE
03 March 2017