

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. 301 of 2017

BETWEEN : UDAY BHAN

Plaintiff

AND : HOUSING AUTHORITY

Defendant

Coram : The Hon. Mr Justice David Alfred

Counsel : Ms A. Lata for the Plaintiff
Mr N. Lajendra for the Defendant

Date of Hearing : 2 February 2018
Date of Judgment : 20 July 2018

JUDGMENT

1. This is the Plaintiff's Originating Summons (O.S.) wherein he is applying for the following:
 - (1) An order to set aside the cancellation of Housing lease No.374757 (lease) which was done on the Defendant's application.
 - (2) An order for the Defendant to issue a lease to the Plaintiff by reconveying the lease.
 - (3) An order that the Defendant disclose to the Plaintiff all details of the mortgage sale and any processes taken to serve the Plaintiff with any legal documents.
 - (4) Alternatively the Defendant after deduction of rental arrears refund to the Plaintiff the balance or alternatively the Defendant conduct a re-sale of the property and the Plaintiff purchase it and/or alternatively the Defendant issues a separate title on another property belonging to the Defendant which the Plaintiff can purchase at a negotiable price..

2. In his affidavit in support of the O.S., the Plaintiff deposes as follows:
 - (1) He was the registered lessee of Lot 22 on DP 5594, Makosoi Estate, Deuba which was issued to him on 5 March 1993 by the Defendant under Housing lease Title No.182650, until it was cancelled by the Defendant.

- (2) Until he left to live in the United States after 2001, he had never received any notices from the Defendant about any rents or rental arrears.
 - (3) Early in 2015, his son came back to Fiji from abroad and on enquiring of the Defendant was asked to pay the rental arrears.
 - (4) When his daughter went to pay the arrears she was informed the property was already under a mortgage sale.
3. The Affidavit in Opposition is by Suresh Chand, an acting manager of the Defendant who deposed as follows:
- (1) One of the conditions of the lease was that the Plaintiff pay yearly ground rental. In 2011, it was noted the Plaintiff had been in substantial arrears in respect of payment of ground rental.
 - (2) The Defendant issued a notice on 15 September 2011 (notice) advising the Plaintiff that he had breached the lease by failing to clear the arrears for the ground rentals and if the arrears were not cleared it would result in cancellation of the lease. The Plaintiff was given 30 days to remedy the breach.
 - (3) The Defendant sent the notice to the Plaintiff's address in its file record but was advised the Plaintiff no longer worked at Carpenters Shipping. So the Defendant had no other address for him except that of the subject property. The Plaintiff did not remedy the breach and bring his rental payment in order.

- (4) The Defendant issued a Remedial Notice dated 23 June 2014 requiring the Plaintiff to clear his ground rental within 30 days but the Plaintiff failed to comply. The Defendant had no option but to terminate the lease.
 - (5) On 30 July 2014 the Defendant issued the Plaintiff a notice of Re-Entry advising it had entered and taken possession of the subject land.
 - (6) The lease was then cancelled on 3 September 2014 and the Defendant proceeded to sell the subject land to a third party who was issued a fresh lease. The sale was not through a mortgagee sale but by tender.
 - (7) At the time of re-entry the amount outstanding was \$1,535.52. The advertisement and other fees and charges came up to \$2,360.99.
4. The hearing commenced with the Plaintiff's Counsel submitting that the Plaintiff says he never received any notices from the Defendant. He had gone to the USA in 2001. He asks for the return of the balance of the sale proceeds after deducting what he owes to the Defendant.
 5. Counsel said the premium under clause 30 of the lease was \$3,600 and the amount realized by the sale was \$26,000. (Both these figures were confirmed by counsel for the Defendant). The Plaintiff is therefore entitled to the sum of \$26,000 less the legal costs.
 6. Counsel concluded that if the court is not minded to enter judgment for the Plaintiff, then the Defendant will be unjustly enriched.

7. Counsel for the Defendant then submitted that the Plaintiff did not tell the Defendant that he was leaving and he did not give them an alternative address. The Remedial Notice was served by being left at the address of the property concerned. He said the arrears since 1992 came up to \$1535.52. This is not a mortgage sale. The tender exercise cost the Defendant \$2,360.99. Deducting these 2 sums from the premium of \$3,600 would leave the Plaintiff still owing the Defendant \$296.51.
8. Counsel for the Plaintiff in her reply said she was only asking for payment and not for cancellation of the lease etc.
9. At the conclusion of the arguments I said I would take time for consideration. Having done so I now deliver my decision.
10. The sole issue for the court to decide is the legal effect of clause 30 of the Sub-Lease. This reads as follows: "In the event of exercise of powers of re-entry by the lessor to the demised land, the same shall be sold by tender to a purchaser approved by the lessor in its entire discretion, and the actual amount of premium charged by the lessor for the granting of the sub-lease or the amount realised on sale by tender by virtue of powers contained or implied in this lease, whichever amount is lesser, to be paid to the out-going lessee after deduction of all costs or any other incidental expenses incurred on the sale of the said demised land". This is part of the sub-lease dated 15 May 1990 signed by the Plaintiff.

11. It is clear to my mind that the effect of this clause is that the Plaintiff is to receive the lesser of the amount of premium or the amount realized by the sale by tender. From this lesser amount is to be deducted all costs or incidental expenses incurred on the sale. A perusal of the Sub-Lease does not reveal any other entitlement to the Plaintiff in the situation that has arisen in this matter.

12. I do not think the Plaintiff can seriously say that the Defendant is not entitled to exercise its right to cancel the lease by re-entry and possession under clause 29 when he makes no attempt to deny that the arrears exist. Instead he says he never received any notice which begs the question how is the Defendant to know that he had left for the USA in 2001 and to where. He cannot be heard to complain if he failed to inform the Defendant of an address in Fiji where he could be effectively served with any notice.

13. At the end of the day the only issue for the court to decide is the amount if any that the Plaintiff is entitled to receive under clause 30. The figures accepted by Counsel on both sides are as follows:
 - (1) Premium \$3, 600.
 - (2) Costs : \$2,360.99Deducting (2) from (1) leaves a balance of - \$1,239.01 due to the Plaintiff.

14. I do not accept the contention of Counsel for the Defendant that the ground rental arrears can be deducted from the premium. I do not construe Clause 30 as providing for this.

15. In the result the Defendant has to pay the Plaintiff the sum of \$1,239.01 plus costs summarily assessed at \$250, and I so order.

Delivered at Suva this 21st day of July 2018.




.....

David Alfred

JUDGE

High Court of Fiji