

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

CIVIL ACTION NO.: HBC 103 of 2016

BETWEEN : FUSHUN FARM LIMITED **PLAINTIFF**

AND : AUTOMART LIMITED **DEFENDANT**

APPEARANCES/REPRESENTATION

PLAINTIFF : Mr J Vulakouvaki [Jiten Reddy Lawyers]
DEFENDANT : Ms V Kirti [Reddy & Nandan Lawyers]
RULING OF : Acting Master Ms Vandhana Lal
DELIVERED ON : 07 March 2019

INTERLOCUTORY RULING

[Striking Out action for want for prosecution pursuant to Order 25 rule 9 High Court Rules]

Application

1. This is a Notice dated 19 January 2018 pursuant to Order 25 rule 9 of the High Court Rules issued by the Court on its own motion.
2. As per the notice the parties are asked to give notice of intention to proceed or else the action will be struck out.

They are further required to show cause why the action should not be struck out for want for prosecution or as an abuse of process of the Court.

History of the Proceedings

3. The Plaintiffs' Counsel on 2 May 2016 filed a Writ of Summon and Statement of Claim claiming damages for defects found on two vehicles the Plaintiff had purchased from the Defendant.

According to the Plaintiff, the Defendant sold the vehicles by deception, fraud and false promise as well as misrepresentation.

4. The Defendant's Counsel on 12 May 2016 filed an acknowledgment of service, acknowledging service of Writ of Summon and giving its intention to defend the action.
5. A Statement of Defence was subsequently filed on 27 May 2016 followed by a Reply to the Defence by the Plaintiff filed on 28 June 2016.
6. Later on 28 September 2016 the Plaintiff's Counsel filed an amended Writ of Summon.

Amendment was only to address of the registered office of the Defendant.

The amended writ was served on the Defendant on 19 January 2017.

7. The Defendant on 27 January filed an amended Statement of Defence.
8. The Order 25 rule 9 notice so issued by the Court was first called on 26 March 2018 when court was informed by Plaintiff's Counsel it had no further instruction from the Plaintiff.
9. On 3 April 2018 a Reply to Statement of Defence was filed by the Plaintiff's Counsel with a notice of intention to proceed.

The reply to Statement of Defence was later withdrawn in Court on 16 April 2018 as it was filed without the leave of the Court and that there was on foot Order 25 rule 9 notice.

10. On 16 April 2018, the Court further imposed an unless order to be activated upon non-compliance of following orders:

If affidavit to show cause is not filed and served within seven (7) days and if cost \$300 not paid in seven (7) days; the unless order will be activated that is to strike out the Plaintiff's claim.

An Affidavit to show cause was filed on 23 April 2018.

11. Later on 2 May 2018 matter was adjourned to 7 June 2018 for Defendant to file/serve a reply to Plaintiff's Affidavit to show cause.
12. The Defendant filed its reply on 7 June 2018.

Reason stated by Parties

13. According to Mr Rufu Zhao a director of Plaintiff Company he resides at Waibau, Naitasiri and had no form of telephone or mobile contact whereby his lawyers could contact him.

He is a farmer and hardly comes to the town side.

He thought that his initial instruction was enough for his lawyers to take his case forward till completion.

He only realised that his lawyers wanted to see him until his lawyers representatives came looking for him.

He is a lay person and did not realise he had to keep contact with his lawyer to progress this matter.

Delay was unintended and he wishes for the matter to proceed.

He has a meritorious claim and will be prejudiced if struck out as he was incurred substantial lose as a result of damage caused to his business.

14. According to Hasmukh Patel a director with Defendant Company the reasons advanced by Plaintiff is not good or proper reasons.

The Plaintiff will not be prejudiced as it still has possession of the truck and is conducting business.

The Defendant's Suva Office at Waimanu Road has in 2017 moved to Jerusalem Road. It's Lautoka Office on Bowalu Road moved to Vitogo Parade, Lautoka in 2017.

Mr Patel had conducted search of documents but could not locate them. He requested the Head Office to send the original copies however they are unable to locate the document despite search. Documents were at previous location the head office had suffered extensive water damage.

If matter proceeds Defendant will be prejudice.

Determination

15. *"There are two distinct, though related, circumstances in which an action may be dismissed for want for prosecution namely (a) when a party has been guilty of intentional and contumelious default, and (b) where there has been inordinate and inexcusable delay in the prosecution of the action"* – the Supreme Court Practice 1993 Volume 1 paragraph 25/1/5 at page 471.

16. Hence the court has to make findings:

- a. Is there a deliberate default in compliance with a peremptory order of the court or conduct amounting to an abuse of process of the court; or
- b. Is there inordinate delay and inexcusable delay on the part of the Plaintiff or his lawyers giving rise to substantial risk that is it not possible to have a fair trial of the issues in the action or it will cause serious prejudice to the Defendant?

17. Pursuant to Order 25 rule 1 of the High Court Rules the Plaintiff must within one-month after the pleading in the action are deemed to be closed, take out a summons for directions.
18. Sub rule (4) allows the Defendant to apply for dismissal of action if the Plaintiff does not take out a summon for direction as stated earlier.
19. The Plaintiff did not reply to the Statement of Defence and failed to file its summons for direction and has not taken any action until the Order 25 rule 9 notice was issued some one year two months later.
20. With this being age of modern technology and communication via mobile phone being the most common means, the reason given by the Plaintiff for not communicating with his counsel is not acceptable.

On one hand he claims not to have telephone or mobile phone and to hardly ever coming to town side whilst on the other (paragraph 12 of his affidavit) he states he organises for carting of gravel and vegetable for his customers Fiji wide.

How does he then takes orders and organises carting of vegetables and gravel in Fiji wide?

21. His lawyers had only after issuance of Order 25 rule 9 notice made attempts to physically locate the Plaintiff.

Why could they not make this attempt in the one year two months period?

22. There is inordinate and inexcusable delay in prosecuting the matter.
23. The Defendant claims to be prejudice by this as it claims the documents relating to the transaction has been damaged due to water at the Head Office previous location. This water damage was in December 2018.

Action was filed in 2016 and definitely the Defendant would have handed to its Counsel document relevant to the matter.

24. Furthermore it is a Solicitors obligation [once action is filed in Court] to ensure that the documents are not destroyed.
25. Considering the above I make following orders:
 - i. The plaintiff to **file and serve** its reply to the Statement of Defence and Summon for Direction in 7 days that is on or before 4 pm 14 March 2019;
 - ii. **Unless the Plaintiff abides** by the above condition within the time stipulated the action on its entirety shall stand dismissed with further cost.

26. I will not make any award for cost on the Order 25 rule 9 notice, as the Defendant on their part have also failed to move the court under the rule.




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Vandhana Lal [Ms]
Acting Master
At Suva.