

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

CIVIL ACTION NO. HBC 303 OF 2019

BETWEEN : **BHAG WATI** of Yalalevu, Ba, Domestic Duties.

PLAINTIFF

AND : **SHASI SHALENDRA PRASAD** of Vuniyasi, Nadi, Driver.

DEFENDANT

Appearances : Ms S. Shafique with Mr M. Yunus for the plaintiff
Mr E. Maopa for the defendant
Date of Hearing: 17 July 2020
Date of Ruling : 31 August 2020

R U L I N G

[on setting aside a default judgment]

Introduction

[01] The application before the court is an application for setting aside a default judgment of 30 April of this year, given by this court, as the plaintiff appeared entitled to on her statement of claim where the defendant filed neither an acknowledgement of service nor a statement of defence. The judgment states that:

1. *The defendant shall pay the sum of \$41,000.00 to the plaintiff.*
2. *The defendant shall pay \$100.00 per day to the plaintiff from 6 January 2019 until the judgment sum is paid in full.*
3. *The plaintiff shall be entitled to general damages and cost as assessed by the Master.*

[02] On 19 May of this year, filed a summons supported by an affidavit ('*the application*'), the defendant/applicant ('*the defendant*') seeks the following orders:

- a) *That there be stay of execution of the Judgment entered against the defendant on 30 April 2020;*
- b) *That the default Judgment so entered in this matter be set aside and the defendant be given unconditional leave to file statement of defence and defend the within action.*
- c) *That costs of the application be costs in the cause.*

[03] The application states that it is made under O 13, R 9, O 19, R 6, 7 and 9 of the High Court Rules 1988, as amended (“HCR”).

[04] The plaintiff/respondent (*the plaintiff*) has filed two affidavits in opposition to the application, to which the defendant has filed an affidavit in reply.

[05] At the hearing, both the parties orally argued the matter. In addition, both parties tendered their written submissions.

Background

[06] By a Bill of Sale executed and dated 12 December 2014, which was registered with the Registrar of Deeds on 30 December 2014 (*“Bill of Sale”*), the plaintiff agreed to lend the sum of \$41,000.00 as principal sum to the defendant.

[07] Pursuant to the terms of the Bill of Sale, the defendant agreed with the plaintiff, among other things:

- (a) That the defendant will transfer and assign unto the plaintiff the vehicle and the benefit of the Taxi Business (Permit Number T2497/26439) as described in the schedule of the Bill of Sale.
- (b) The plaintiff will take possession of the vehicle and the plaintiff will be entitled to the benefits from the Taxi Business (Permit Number T2497/26439).

[08] The defendant defaulted in performing the bill of sale. This has resulted in the plaintiff issuing a writ of summons endorsed with the statement of claim. The plaintiff claimed that:

- I. *An order that the sum of \$41,000.00 paid under the Bill of Sale by the Plaintiff to the defendant be returned.*
- II. *Loss of income from 6 January 2019, at a rate of \$100.00 per day until the final determination of this matter;*
- III. *Specific performance of the Agreement dated 12 December 2014 between the plaintiff and the defendant;*
- IV. *Damages for breach of Bill of Sale in lieu of or in addition to specific performance and;*
- V. *Costs on indemnity basis*

[09] The writ of summons was served on the defendant on 2 December 2019, by a registered Bailiff, Ashok Chand and an affidavit of service to that effect was filed on 4 February 2020.

[10] The defendant failed to file either an acknowledgement of service or a statement of defence after the prescribed time. On 30 April this year, the plaintiff entered against the defendant the default judgment.

[11] The defendant seeks to set aside that judgment.

The law

[12] The HCR, Order 13 deals with the failure to give notice of intention to defend. Rule 5 of that Order provides:

“Setting aside judgment (O 13, R 10)

10 Without prejudice to Rule 8 (3) and (4), the Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.”

[13] The HCR, O 19, deals with default of pleading and R 9 of that Order states:

“Setting aside judgment (O 19, R 9)

“9 The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.”

The principles on setting aside

- [14] In *Wearsmart Textiles Ltd v General Machinery Hire Ltd* [1998] FJCA 26; Abu0030u.97s (29 May 1998), the Fiji Court of Appeal set down the governing principles to an application to set aside a judgment that has been regularly entered:

"The general principles upon which a Court should act on an application to set aside a judgment that has been regularly entered, are set out in the White Book, i.e. The Supreme Court Practice 1997 (Volume 1) at p.143. They are as follows:-

"Regular judgment -If the judgment is regular, then it is an (almost) 13/9/5 inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating facts showing a defence on the merits (Farden v. Richter (1889) 23 Q.B.D. 124. "At any rate where such an application is not thus supported, it ought not to be granted except for some very sufficient reason," per Huddleston, B., ibid. p.129, approving Hopton v. Robertson [1884] W.N. 77, reprinted 23 Q.B.D. p. 126 n.; and see Richardson v. Howell (1883) 8 T.L.R. 445; and Watt v. Barnett (1878) 3 Q.B.D. 183, p.363).

For the purpose of setting aside a default judgment, the defendant must show that he has a meritorious defence. For the meaning of this expression see Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc., The Saudi Eagle [1986] 2 Lloyd's Rep. 221, C.A., and note 13/9/14, "Discretionary powers of the court," below.

On the application to set aside a default judgment the major consideration is whether the defendant has disclosed a defence on the merits, and this transcends any reasons given by him for the delay in making the application even if the explanation given by him is false (Vann v. Awford (1986) 83 L.S.Gaz. 1725; The Times, April 23, 1986, C.A.) The fact that he has told lies in seeking to explain the delay, however, may affect his credibility, and may therefore be relevant to the credibility of his defence and the way in which the court should exercise its discretion (see para. 13/9/14, below)."

- [15] In *Suva City Council v Meli Tabu* ABU 55 of 2003S, the Court of Appeal, referring to *Pankaj Bamola & Another v Moran Ali* FCA 59/90 stated that:

“However, in order for the court to properly exercise the discretion whether or not to set aside a regularly obtained default judgment, it has been consistently held that certain basic preconditions must be fulfilled by the party making the application.

These are:-

- (i) Reasons why judgment was allowed to be entered by default.*
- (ii) Application must be made promptly and without delay*
- (iii) An affidavit deposing to facts that show that the defendant has a defence on the merits”*

... we subscribe to the White Book’s preferred view that “unless potentially credible affidavit evidence demonstrates a real likelihood that a defendant will succeed on fact no “real prospect of success” is shown and the relief should be refused.”

Discussion

- [16] The defendant applies to set aside the judgment entered against him. The impugned judgment was entered by the court on 30 April 2020, in default of notice of intention to defend. In doing so, the court has considered whether the plaintiff was entitled to relief on her statement of claim pursuant to O 19, R 6.
- [17] Under O 19, R 6, the plaintiff filed a summons to enter judgment against the defendant in respect of the claim on the ground that the defendant had failed to serve a defence on the plaintiff within the prescribed time.
- [18] The defendant ought to have filed a defence within 14 days after the service of the writ on him. The writ was served upon him 2 December 2019. The 14-day period expired on 16 December 2019. The defendant had to serve a defence on the plaintiff by 16 December but he failed. As a result, the plaintiff filed his application to enter judgment in default of defence on 14 April 2020, and the court entered the default judgment on 30 April 2020.

[19] On 19 May 2020, the defendant filed the application to set aside the default judgment.

[20] The court has the discretion to set aside a default judgment (see O, 19, R 9).

The Delay

[21] The application for setting aside, I should say, has been made promptly. The default judgment was entered on 30 April 2020, which was sealed by the plaintiff on 5 May 2020. The defendant had made his application to set aside on 19 May 2020. I do not find undue or inordinate delay in making the application to set aside.

Defence on the Merits

[22] The major consideration in a setting aside application of a default judgment is whether the defendant has disclosed a defence on the merits.

[23] The defendant submits that the default judgment has been entered irregularly. In that he says that: *"the plaintiff has failed to personally serve the defendant and the service by bailiff is irregular. The actual service of the writ was effected at the defendant's office and left at the reception area with a staff namely Keshni Naidu."*

[24] A writ must be personally served on each defendant by the plaintiff or his or her agent. A writ for service on a defendant within the jurisdiction may, instead of being served personally on him or her, be served-(a) by sending a copy of the writ by ordinary post to the defendant at his or her usual or last known address; or (b) if there is a letter box for that address, by inserting through the letter box a copy of the writ enclosed in a sealed envelope addressed to the defendant (see O 10, R 1 (1) and (2)).

[25] The affidavit of service of Ashok Chand, a registered bailiff states that he did on 2 December 2019 at Namaka, Nadi personally served the defendant with a true

copy of the writ. In his subsequent affidavit filed in the setting aside proceedings further confirms that:

- a) He personally served the defendant the writ in his presence but he refused to accept or receive the writ.
- b) The defendant refused to acknowledge receipt of a copy of the writ.
- c) During the service of the writ, the defendant was present at the office located in Namaka.
- d) The defendant had full knowledge of the service of the writ since the service was made in his presence at his office located in Namaka.

[26] Interestingly, what Keshni Naidu (defendant's salesperson) state in her affidavit. She states that: *"the gentleman who refused to give his name dropped a sealed envelope on the defendant's table and left the office. She contacted the defendant and told him that a man came to drop and envelope. She was then advised by the defendant to open the sealed envelope, it was then she had seen that it was the writ. Since the defendant was in Suva, she had to wait for him to come to Nadi and then she would give him the envelope."*

[27] The defendant admits that the writ (sealed envelope address to the defendant) was dropped at his office in front of his staff, Keshni Naidu.

[28] O 10, R 1 (2) permits the substituted service by sending a copy of the writ by ordinary post to the defendant at his or her usual or last known address. Like sending a copy of the writ by ordinary post to the defendant's usual or last known address, the bailiff had dropped the sealed envelope (containing the writ) addressed to the defendant at his office in front of his staff. This service was not objectionable. The defendant had full knowledge of the writ. Therefore, the service was, in my view, proper.

[29] This follows that the default judgment against the defendant has been entered regularly. If the judgment is regular then it is an (almost) inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating facts showing a defence on the merits (see *Wearsmart's* case above).

[30] The defendant's affidavit does not state facts demonstrating a defence on merits. However, he has attached a draft statement of defence with a counterclaim where he states:

- a) The plaintiff was to retain the income earned from the Taxi Business until such time she had recovered her loan but denies and disputes that there was any agreement for the transfer or assignment of the taxi permit.
- b) Further the Bill of Sale speaks of itself and there was no sale of the Taxi Permit by the defendant to the plaintiff as this would have required the consent of Land Transport Authority and contrary to section 11 of the Land Transport (Public Service Vehicles) Regulations 2000.
- c) That the plaintiff failed to adhere to the verbal agreement in the operation of the defendant's taxi business in that she failed to cooperate and work with the defendant by failing to have the vehicle comprehensively insured.
- d) That the plaintiff also used the services of a suspect driver and continues to operate the taxi business after January 2018.
- e) That the failure to operate the taxi business by the plaintiff resulted in loss and damages to the defendant as the vehicle is forcefully kept by the plaintiff.

[31] It is important to note that the defendant did not dispute receiving a loan of \$41,000.00 from the plaintiff.

[32] The default judgment did not deal with the transferring of the taxi and the permit to the plaintiff. It only orders the defendant to return of the loan with payment of \$100.00 per day to the plaintiff from 6 January 2019 until the judgment sum is paid in full.

[33] I have carefully considered the draft statement of defence, albeit it is not on affidavit, and I am unable to find facts showing a defence on the merits in respect of the loan. In fact, the defendant had admitted that he received a loan of \$41,000.00 from the plaintiff. It is worth noting that the defendant's affidavit fails to state facts showing a defence on merits.

Conclusion

[34] For the reasons given, I conclude that the defendant has not deposed facts showing a defence on the merits in his affidavit or in his draft statement of defence. In a setting aside application to set aside a regularly entered judgment, the defendant must show a good defence based on facts and demonstrate, at least, a triable issue at the trial. I find that the application has no merits. I also find this is not an appropriate case to exercise the discretion given to me under O 19, R.9 of the HCR. I would, therefore, dismiss the application to set aside the default judgment with costs of \$550.00 (summarily assessed) payable to the plaintiff by the defendant.

The Result

1. Application to set aside the default judgment entered on 30 April 2020 is dismissed.
2. The defendant shall pay summarily assessed costs of \$550.00 to the plaintiff.

M.H. Mohamed Ajmeer
31/8/20

.....
M.H. Mohamed Ajmeer

JUDGE



At Lautoka
31 August 2020

Solicitors:

M. Y. Law, Barristers & Solicitors for the plaintiff

Babu Singh & Associates, Barristers & Solicitors for the defendant