In the High Court of Fiji

At Suva

Civil Jurisdiction

Civil Action No. HBC 65 of 2020

Amraiya Naidu

Plaintiff

v.

Rajen Swamy

Defendant

Counsel: Mr R.K. Naidu with Mr D. Singh for the plaintiff
Mr S. Nand for the defendant

Date of hearing: 29th August,2022

Date of Ruling: 14th April,2023

Ruling

1. The plaintiff seeks leave to appeal the Ruling of the Master dismissing his summons for summary judgment.

2. The plaintiff, in his supporting affidavit states that he instituted this action to recover the sum of $200,000.00 he lent to the defendant. The defendant agreed to repay the debt within one year. On 10 April, 2019, the parties formalized their oral agreement by entering into a Lending Agreement, (LA).

3. The proposed grounds of appeal read:

i. *The learned Master erred in law and in fact and failed to exercise her discretion judicially and in accordance with applicable legal principles in concluding that the case was not a proper one to be determined on an Order 14 application and that "the issue if the 2013 debt is being acknowledged and whether the claim is not barred by Section 4 of the Limitation Act should be tried out via viva voce evidence" when*

a. the learned Master had already in the interlocutory ruling found at paragraph 18 "that there is sufficient evidence that on 30th January 2013 the [Appellant] received into his bank account with ANZ a sum of $200,000 and later on 31st January 2013 he transferred the said sum to [the Respondent]".

b. there is <u>uncontested</u> affidavit evidence by the Appellant that

(i) The Lending Agreement intended to formalize the earlier 2013 oral contract between the Appellant and the Respondent.

(ii) The Respondent acknowledged the Debt by signing the Lending Agreement dated 10 April 2019.

(iii) The Appellant's right to claim against the Respondent is deemed to have accrued on 10 April 2019. The Debt and any proceedings to pursue it are therefore <u>not</u> time-barred.

c. there are no triable issues or bona fide defences which the Respondent has raised (or can raise). Accordingly, under the principles in Anglo-Italian Bank v Wells (1878) 38 LT 201 the Court has a duty to enter summary judgment in favour of the Plaintiff.

d. even on the basis of the matters pleaded in the Statement of Defence filed in this action, it would be improbable (and disingenuous) for the Respondent to claim that the Lending Agreement was not an acknowledgment of the Debt but a separate/new loan agreement when:

(i) It had the same parties, that is, the Appellant and the Respondent.

(ii)It concerned the same amount that is $200,000.

(iii) It related to the same purpose (business investment, in particular purchase of the Flagstaff Laundry).

(iv) As a matter of common sense, there would be no reason for the Appellant to lend a further F$200,000 to the same person for the same purpose when the existing debt remained unpaid.

ii. *The learned Master erred in law in making the interlocutory ruling by not finding that in the circumstances, final judgment should be entered in favour of the Appellant as a matter of justice.*

4. The defendant, in his affidavit in opposition to the summons for leave to appeal admits that the plaintiff did transfer a sum of $200,000.00 on 31st January, 2013, to his bank account, but denies that monies were lent. The plaintiff did not demand same till October 2019, six years later. The LA was not an acknowledgment of the alleged debt nor an intention to formalize the alleged oral contract.

5. The plaintiff, in his reply states that he made several demands for repayment of the sum of $200,000.00 by phone and text messages.

6. The Master held that that there was sufficient evidence that on 31st January,2013, the plaintiff transferred the sum of $200,000.00 to the defendant. She further held that the issue whether the debt was acknowledged and barred by section 4 of the Limitation Act should be tried by oral evidence.

7. The proposed grounds of appeal contend that the Master erred in concluding that this case cannot be determined summarily and the issues whether the debt was acknowledged and barred by section 4 of the Limitation Act should be tried by viva voce evidence, since she found that there was sufficient evidence that the plaintiff transferred the money to the defendant.

8. It is further contended that the plaintiff's affidavit evidence that the LA was an acknowledgement of the debt was not contested. No triable issues or bona fide defences were raised. It would be improbable for the defendant to claim that the LA was not an acknowledgment of the debt, but a separate new loan agreement.

9. Or 14, r (1) provides that the plaintiff may apply for judgment against the defendant on the ground that "*the defendant has no defence to a claim*".

10. Fatiaki J in ***Fiji Development Bank v Moto,*** [1995] FJHC 166; HBC 0055j.95S(22 November,1995)

> *..the proper approach to an application for summary judgment under* ***Order 14*** *the purpose of which* ***"... is to enable a plaintiff to obtain a quick judgment where is plainly no defence to his claim." (Home and Overseas Insurance Co. v. Mentor Insurance Co. (U.K.) Ltd.*** *(1989) 3 ALL E.R. 74.)*
> *The correct approach to an application .. is succinctly summarised in my view in the headnote to the* ***New Zealand Court of Appeal*** *decision in* ***Pemberton v. Chappell*** *[1986] NZCA 112; (1987) 1 N.Z.L.R. 1 where it was said of the N.Z. equivalent of* ***Order 14****:*
> ***"Held: ... the High Court Rules casts onto the plaintiff the onus of convincing the Court that the defendant has no fairly arguable defence. Normally that onus will be satisfied by the plaintiff's affidavit verifying the allegations in the Statement of Claim and his oath that he believes that the defendant has no defence to the claim ... If a defence is not evident on the plaintiff's pleading and the defendant wishes to resist summary judgment, the defendant must file an affidavit raising an issue of fact or law and give reasonable particulars of the matters which he claims ought to be put in issue. Where the only arguable defence is a question of law which is clear-cut and does not require findings on disputed facts or the ascertainment of further facts, the Court may, and normally should, decide it on the application for summary judgment. But where the defence raises questions of fact on which the outcome of the cause may turn it will not often be right to enter summary judgment."***
> *Over a century earlier in* ***1880 Lord Blackburn*** *in* ***Wallingford v. Mutual Society*** *(1880) 5 A.C. 685 said of the nature of the affidavit required from a defendant in opposing an* ***'Order 14'*** *application, at* ***p.704****:*
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> > ***"I think that when the affidavits are brought forward to raise (a) defence they must, if I may use the expression, condescend upon particulars. It is not enough to swear 'I say I owe the man nothing'. Doubtless, if it was true, that you owed the man nothing as you swear, that would be a good defence. But that is not enough. You must satisfy the judge that there is reasonable ground for saying so... And in like manner as to illegality, and every other defence that might be mentioned."***

11. On the burden of proof in an application for summary judgment, the Court of Appeal in ***Chandra Latchmaiya Naidu & Anr. v Carpenters (Fiji) Limited***,(1992)38 FLR 215 at page 216 referred to the following passage from the judgment of the Court of Appeal in ***Maganlal Brothers Ltd v L.B. Narayan & Co,*** Civil Appeal No. 31 of 1984 :

> *"The matters for consideration by the judge on determination of this matter are contained in Rules 3 and 4 of Order 14, the tenor and effect of which are conveniently summarized in Halsbury's Law of England (4th Edn) Vol. 37 paras. 413-415 the relevant portions of which read:*
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> "*413 – where the plaintiff's application for summary judgment under Order 14 is presented in proper form and order**, the burden shifts to the defendant and it is for him to satisfy the court that there is some issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial. Unless the defendant does so, the court may give such judgment for the plaintiff against the defendant as may be just…".***
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> ***The defendant may show cause by affidavit or otherwise to the satisfaction of the court he must condescend upon particulars, and in all cases, sufficient facts and particulars must be given to show that there is a genuine defenc****e."* (emphasis added)

12. In ***Carpenters Fiji Ltd v Joes Farm Produce Ltd,*** **[**2006] FJCA 60; ABU 0019U.2006 S(10 November,2006) the judgment of the Court of Appeal stated that:

> *(a)* ***The purpose of O.14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up, a bona fide defence or raise an issue against the claim which ought to be tried****.*
> *(b) The defendant may show cause against a plaintiff's claim on the merits e.g that he has a good defence to the claim on the merits or there is a dispute as to the facts which ought to be tried or there is a difficult point of law involved.*
> *(c)* ***It is generally incumbent on a defendant resisting summary judgment to file an affidavit which deals specifically with the plaintiff's claim and affidavit and states clearly and precisely what the defence is and what facts are relied to support it****…*(emphasis added)

13. In the present case, the defendant did not raise any triable issues or defence before the Master. He did not file opposition to the application for summary judgment.

14. The LA of 10th April, 2019, (as attached to the affidavit in support of the summons for summary judgment) provides that the plaintiff has agreed to loan the sum of $200,000.000 to the defendant and the "*money is given on the condition that the* (defendant) *shall repay the same, interest free on or before 31st January,2019*".

15. Mr Nand, counsel for the defendant submitted that the plaintiff paid the sum of $200,000.00 to the defendant on 31st January,2013.

16. Mr Singh, co-counsel for the plaintiff submitted that the LA was preceded by the repayment date as it was signed on 10th April,2019, and provides for a repayment date on 31st January,2019, which is consistent that the LA was an acknowledgment of the debt.

17. Section 12(3) of the Limitation Act provides that where a person acknowledges a claim, the right to sue is deemed to have accrued on the date of the acknowledgement.

18. The issue turns on the question whether the LA constitutes an acknowledgment of the debt, as submitted by Mr Naidu, counsel for the plaintiff.

19. In my view, the proposed grounds of appeal raises a point of law on the interpretation of the LA and have prospects of success.

20. I am mindful that the Courts do not encourage appeals from interlocutory orders for good reason. But, in this case, as the High Court of Australia in ***Ex parte Bucknell***, [1936] 56 CLR 221 at pgs 224 to 225 as cited in the written submissions of the plaintiff stated :

> *…There is one class of case which raises little difficulty.* ***If the interlocutory order … has the practical effect of finally determining the rights of the parties, though it is interlocutory in form, a prima facie case exists for granting leave to appeal.*** ..(emphasis added)

21. The application for leave to appeal is allowed.

22. ***Orders***

a. The application for leave to appeal the Order of the Master is allowed.

b. I make no order as to costs.

A.L.B. Brito-Mutunayagam
JUDGE
14th April , 2023