

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA

Action No. HBC 69 of 2012

BETWEEN : **KIRAN DEVI AUTAR** of 5/15 Mary Street, Macquarie Fields, New South Wales, Australia but presently residing at Carrerras, Votualevu, Nadi, a retired civil servant.

Plaintiff

AND : **EDWARD NAGAIYA** of Nadi Back Road, Nadi, trading under the name and style of **EDWESH BUILDERS** and **SWADESH WATI** of Nadi Back Road, Nadi domestic duties.

Defendant

R U L I N G

INTRODUCTION

[1] On 06 August 2012, the plaintiff entered default judgement against the defendant on account of the latter's failure to file a statement of defence within the time stipulated under the High Court Rules 1988. The defendant now applies under Order 19 Rule 9 of the High Court Rules 1988 to set aside default judgment. Order 19 Rule 9 states as follows:

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

[2] The plaintiff's claim against the defendant is for payment of monies she had allegedly paid the defendant at various times from May 2009 to October 2010. The total amount that the plaintiff claims are:

- (i). \$201, 195-00 pursuant to an Acknowledgement of Debt signed by the Defendant on 04 October 2010.
- (ii). \$155,520-00 being interest on the above sum from 31 October 2010 to 31 March 2012.
- (iii). interest from 31 March 2012 to date of judgement.

HISTORY

[3] The plaintiff and the defendant knew each other in Labasa. The exact nature of their relationship is a matter of some contention between them. The defendant asserts that he and the plaintiff, had an extra-marital affair in Labasa. At the time of the alleged affair, they were both nearing retirement age and were working together at the Public works Department. This allegation is crucial to the defendant's case. He argues that all monies that the plaintiff paid him was based on her love and affection for him. In other words, the monies were not given as a loan. The plaintiff vehemently refutes the alleged affair.

[4] In his affidavit, the defendant deposes *inter alia* as follows:

....I am the sole trader and the first named defendant and am authorised to make this affidavit.
.... Edwesh Builders was engaged in building construction and maintenance services
.... Edwesh Builders is not operational anymore as of April 2010.
.... I am in dispute with the plaintiff over the said claim and our relationship.
.... I had an intimate relationship with the Plaintiff since 2004 whilst working together at the Public Works Department, Labasa.
.... the Plaintiff continued to advance monies to me on various occasions which was a favour returned due to our relationship .
.... when the Plaintiffs husband died sometimes in 2009, the Plaintiff became closer to me and the Plaintiff's demands in regards to our relationship grew stronger.
.... during the year 2009, the Plaintiff sold her house in Labasa and migrated to Australia, whereupon she put pressure upon me to join her in Australia and to live with her.
.... whenever the Plaintiff visited Fiji I picked her up from the airport and took her to wherever she requested.

MONIES GIVEN

[5] It is common ground between the parties that the plaintiff did give the defendant a total sum of \$112,000 in two payments. The first payment was for the sum of \$72,000. The second was a payment of \$40,000. The defendant acknowledges the above payments as follows in his affidavit:

....whatever monies given to me by the Plaintiff was at all times in favour of the relationship.
....the acknowledgment of debt for \$72,000.00 (seventy two thousand dollars) was purely for the Plaintiff's family justification.

....the acknowledgement of debt of \$72,000.00 dated 4th October 2010 wherefore it was not to be paid back to the Plaintiff and as such there is no justification of accrued interest claimed by the Plaintiff.

....whilst the aforesaid was not to be paid back and the interest derived by the plaintiff is unreasonable and exorbitant and which is not in compliance with the agreement.

.... the plaintiff never asked me to pay the \$72,000.00 or any other monies given to me.

....in spite of non payment to the plaintiff the plaintiff did again on the 13th January 2011 advance me with \$40,000.00 from her term deposit account No. 9802786138 by writing a letter to the Westpac Bank (herein referred to as annexure "EN1").

WHETHER THE PLAINTIFF DID GIVE THE DEFENDANT OTHER SUMS OF MONEY?

[6] What the parties dispute are, firstly, whether there were other monies, apart from the acknowledged \$112,000, given by the plaintiff to the defendant, and, whether, whatever monies the plaintiff gave the defendant were given as loan or whether they were a gift. As noted above, the defendant acknowledges in his affidavit having received \$112,000 (i.e. \$72,000 and later \$40,000) from the plaintiff. He further deposes as follows in his affidavit:

....the plaintiff further advance me monies on numerous occasions at her own free will

EXPLANATION FOR NOT FILING A DEFENCE

[7] The defendant deposes as follows in his affidavit:

....on the 18th day of June 2012 upon my arrival from New Zealand after 3 months I received a Writ of Summons through a bailiff.

....5 days after receiving the Writ of Summons I had an accident at Nadi Back Road whereupon I suffered a fractured skull and fractured rib and as such I did not read the Summons properly.

....I was under the honest impression I would receive on a later date the notice to appear in court and present my side of the case.

....I at the time of receiving the default judgment in November 2012 whereby I was summoned to appear at the Lautoka High Court on the 6th of November 2012 and upon appearing in person I requested the Honourable Master of the High Court to allow me for the setting aside of default judgement and which was allowed (**emphasis mine**)

PLAINTIFF'S POSITION

[8] The plaintiff opposes the application. She says the defendant had admitted being indebted to her for the monies she had lent and advanced to him. She says she also advanced monies to the defendant's wife at the defendant's request. She also denies ever having any intimate relationship with the defendant.

[9] The plaintiff says she has known the defendant since childhood in Labasa. However, she had nothing to do with the defendant. She only came to know the defendant and his wife well after he (the defendant) came to repair their roof upon being hired by her late husband. And the two families became friends thereafter.

[10] According to the plaintiff, the defendant had offered to sell her car whilst they were both still in Labasa. Shortly after, the defendant moved to Nadi. And the plaintiff had allowed him to take the car with him on the defendant's assurance that he would be able to sell the car in Nadi. The plaintiff adds that, thereafter, the defendant and his wife began to request monies from her (the plaintiff). First, they asked her for \$5,300.00. Then they asked her for \$1,5000.00. When they did not refund her money on time, the plaintiff then demanded for the same. She deposes that the defendant then gave her a written undertaking dated the 10 February 2010 to pay the sum of \$8,800.00. This sum included the balance of the money they owed her for the car¹. The plaintiff deposes that she then went to New Zealand. But whilst there, he called her several times to advise her that the said undertaking was not legally binding and that he wanted to prepare it before his solicitors to make it binding. She says that with the hope that he would refund her money, she then returned to Fiji and met both defendants. Back in Fiji, the defendants showed her a whole bundle of documents based on which they claimed that a Peng Xiao Xiao owed a substantial sum of money to Edward Nagaiya for some building works that Nagaiya had carried out for Xiao. The plaintiff says that the defendant reasoned that he has had to pay legal fees and other costs to recover his monies and that he wanted her to assist him with more money. The plaintiff said that she decided to assist the defendant in the hope that, if he succeeded in recovering his money from Xiao, the defendant would then be in a position to settle his debts with her. The plaintiff says that the defendant

¹ A copy of the said undertaking is annexed to her affidavit and marked as "KA1".

then arranged with his solicitors to draw up appropriate documents to secure all her advances to him.

[11] I observe at this juncture that the defendant does not deny having prepared or signed the Acknowledgement of Debt.

[12] The plaintiff further deposes as follows:

- 1.1with the hope to recover the advance I had give to the Defendants between in or about May 2009 to on or about the 4th day of October 2010 at the request of the Defendants I lent and advanced a total sum of seventy two thousand dollars (\$72,000.00) to Edward Nagaiya. Edward Nagaiya had also agreed to pay me interest on the said sum at a rate of twelve percent per month as stated in the Acknowledgment of Debt dated the 4th day of October 2010 that was executed by Edward Nagaiya and I in the presence of his solicitors.
- 1.2I had gone back to New Zealand after Edward Nagaiya had executed the said Acknowledgement of Debt. When I returned he had not paid the money. I then demanded him to pay and advised me that he had bought a ten (10) bedroom apartment in Nadi and that was why he could not pay but he would be able to pay from the income from his apartments, I again became hopeful that he would pay.
- 1.3when I was overseas Edward Nagaiya again convinced me to transfer a sum of forty thousand dollars (\$40,000.00) into the bank account of his wife Swadesh Wati. He had told me that he needed to get a business loan from Fiji Development Bank and had mortgaged his van, machines and daughters house and that he needed to show a deposit of \$40,000.00. I thought that if I paid the sum of \$40,000.00 then I would get back all my money and so I transferred the said money.
- 1.4thereafter the Defendant called me several times and advised that his loan was being processed. He advised me on the 7th day of March 2011 that his loan was approved but that he was short of eight thousand dollars. He tried to borrow this sum from my sister but she refused. He then called me and advised that he had managed to get \$600.00 and that he only needed another Seven Thousand Four Hundred Dollars(\$7,400.00) and that if I lent him this amount he would then finally be able to repay all his indebtness to me. With the hope that I would get all my money back I again transferred a further sum of Seven Thousand Four Hundred Dollars (\$7.400.00) into Swadesh Wati's bank account.
- 1.5in the above manner the Defendants continued to borrow money from me and I kept lending the same to him. He promised to pay each time and as I was desperate to recover my advances I kept on lending money to them. That I had lent him the following further sums of money:
 - 1.5.1 On or about the 2nd day of August 2011 a sum of twenty five thousand dollars (\$25,000.00) to Edward Nagaiya.
 - 1.5.2 On or about the 18th day of August the sum of seventeen thousand dollars (\$17,000.00) to Edward Nagaiya)
 - 1.5.3 On or about 18th day of September 2011 a sum of twenty thousand dollars (\$20,000.00) to Edward Nagaiya.

That a copy of my Westpac bank statement showing the abovementioned withdrawals from my bank account and payment into the Defendants bank accounts or payments to the Defendants is annexed hereto ad marked as "KA5".

- 1.6Edward Nagaiya has never denied owing money to me. He always undertook to pay the money he owed to me. He gave me his undertakings in writing. He even promised to pay in New Zealand. ²

² A copy of his undertakings of the 18th day of June 2011 is annexed hereto and marked as "KA6".

- 1.7by a letter dated the 1^{3th} day of March 2012 Edward Nagaiya gave me a further undertaking that he owed me a total sum of Three Hundred Eighty Thousand Four Hundred Dollars (\$380,400.00). He had arrived by this amount by his own calculations.
2.I deny the allegations contained in the paragraph 10 and 11 of the Affidavit and further say that the money was lent and advanced to the Defendant and the Acknowledgment of Debt for the sum of \$72,000.00 was prepared by the Defendants solicitors at the request of Edward Nagaiya and he was explained of the contents of his undertaking before he signed the same.

The Law

[13] A default judgement entered irregularly must be set aside as of right. However, where the default judgement had been entered regularly, the defendant must show an affidavit of merits in order to succeed in setting aside the default judgement (see Fiji Sugar Corporation Limited v Ismail [1988] FJCA1;[1988]34FLR75 (8July1988)). This does not mean that the defendant must establish its defence. He only need to establish a prima facie defence (Evans v Bartlam). In the case of Fiji Sugar Corporation Limited v Ismail, the Fiji Court Appeal said that:

“.....a draft defence is **not necessary**, what is required is the affidavit disclosing of prima facie defence.

[14] The Court also said that although there is no rule that the defendant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, it is something which the Court can consider in the exercise of its discretion whether or not to set aside the default judgement.

“The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure.”

[15] As to what is meant by "affidavit of merits" – the Fiji Court of Appeal in Wearsmart held that what is required is "an affidavit stating facts showing defence on the merits". The court then went on to state as follows:

Dealing with the discretionary powers of the Courts under English Order 13 r.9 sub-rule 14 the Supreme Court Practice 1997 (the White Book) (Vol. 1 p.145) cites the Court of Appeal's judgment in Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc., The Saudi Eagle [1986] 2 Lloyd's Rep. 221 as authority for following prepositions:

"(a) It is not sufficient to show a merely "arguable" defence that would justify leave to defend under Order 14; it must both have "a real prospect of success" and "carry some degree of conviction". Thus the court must form a provisional view of the probable outcome of the action.

(b) If proceedings are deliberately ignored this conduct, although not amounting to an estoppel at law, must be considered "in justice" before exercising the court's discretion to set aside ."

Notwithstanding the Court of Appeal's later decision in *Allen v Taylor* [1992] P.I.Q.R. 255 which purports to dilute the principles emerging from *Saudi Eagle*, 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 relief should be refused'.

[16] Applying the principles, I am of the view that the defendant's affidavit discloses no defence on the merits which carries some degree of conviction with regards to the \$72,000-00 (seventy two thousand dollars and the \$40,000-00 (forty thousand dollars).

[17] There is an issue though about whether or not extra monies over and above the above figures were in fact received by the defendant from the plaintiff and, if so, how much. This, is something I would rather reserve for trial.

ORDERS

I set aside the default judgement entered against the defendant and in its place, enter judgement for the plaintiff against the defendant in the sum of \$112,000 (one hundred and twelve thousand dollars only). I grant leave to the defendant to file and serve a statement of defence with regards to the balance of the monies which the plaintiff alleges is still owing. Case adjourned to **17 June 2013** for **mention**. Costs in the cause.

.....

Master Tuilevuka
27 May 2013.