

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 269 of 2013

IN THE MATTER of the property
comprised in Crown Lease No. 679, Section
68, Lot No 3 (commonly known as 54
Victoria Parade (*a part of*))

AND IN THE MATTER of the Section
169 of the Land Transfer Act, Cap 131,

BETWEEN : **DAMODAR BROTHERS (FILM) LTD** a limited liability company having
its registered office at 46 Gordon Street, Suva.

PLAINTIFF

AND : **SURIA DHABA** a business having its place of operation at 54 Victoria Parade,
Suva.

DEFENDANT

BEFORE : **Acting Master Thushara Rajasinghe**

COUNSEL : **Mr. Vosarogo V.** for the Plaintiff
Mr. Raman P. Singh for the Defendant

Date of Hearing : **6th February, 2014**

Date of Judgment : **17th April, 2014**

JUDGMENT

A. INTRODUCTION

1. The Plaintiff filed this Originating Summons on 20th of September 2013 seeking
following orders inter alia,

- i. That the Defendant, its servants, agents, and employees and / or occupants give up
immediate vacant possession to the Plaintiff of the premises located on the land

described as Crown/ State lease more appropriately described as Crown lease No 697, section 68 on Lot No 3 otherwise more commonly referred to as 54 Victoria Parade (part of) ;

ii. That the cost of this application be paid by the said defendant.

2. This application was made pursuant to section 169 of the Land Transfer Act. The Plaintiff filed an affidavit of Nazma Pillay in support of this Summons. The Defendant then filed an affidavit of Dipa Devi who is the sole proprietor of the Defendant, followed by Mrs. Pillay's reply affidavit. This Summons was subsequently set down for hearing on 6th of February 2014. Learned counsel for the Plaintiff and the Defendant agreed to conduct the hearing by way of written submissions. I then invited them to file their respective written submissions which they filed accordingly.

B. BACKGROUND

Plaintiff's Case

3. The Plaintiff deposed in their affidavit that the Plaintiff and the Defendant signed a Memorandum of Understanding for Tenancy Agreement for the premises described in the Summons on the 1st of February 2011, for a monthly rental fee of \$1, 811.25. According to this agreement, the tenancy can be terminated by either party upon giving a one month notice in advance prior to termination. Moreover, the landlord reserves the right to give notice and evict the tenant upon non – payment of rent for more than a week or any other objectionable act by the tenant. The Plaintiff further deposed that they received a notice from Suva City council informing them that the tenant has been operating this business without a health and business license nor has lodged any plans for approval of the Suva City Council.
4. The Plaintiff upon receipt of the said notice from Suva City Council, issued a notice dated 13th of May 2013 to the tenant to give them vacant possession of the property by end of business week dated 13th of June 2013 due to the non compliance of paragraph 8

of the tenancy agreement. The Plaintiff stated that the tenant has breached the tenancy agreement by non-compliance of Suva City Council's regulations.

Defendant's Case

5. The Defendant mainly stated that they have already lodged their application for the Health and Business license. Furthermore, stated that there is a pending action against the Defendant instituted by the Suva City Council on this issue in the Magistrate court and the outcome of the said action would allow the Defendant to continue this tenancy agreement. The Defendant alleged that the Plaintiff did not issue any receipt for the rent payment made from July to October 2013. The Defendant further alleged that the Plaintiff falsely informed them that the premises in question was fully compliant with the requirements of the Suva City Council for the operation of a food and catering business.
6. Both parties alleged each other about Mrs. Pillay's forceful entry into the premises which I duly considered, however, I am of the view that this dispute is mainly founded on this alleged breach of the tenancy agreement by the Defendant.

C. THE LAW

7. In view of the evidence presented before me in this action, I find that this Summons falls within the meaning of Section 169 (c) of the Land Transfer Act, where it allows the Lessor to institute proceedings after giving a legal notice to quit or the term of the lease has expired. Section 169 (c) states that ;

“the following person may summon any person in possession of land to appear before a judge in chambers to show cause why the person summoned should not give up possession to the applicant :-

(c) a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired”.

8. Sections 171 and 172 of the Act have dealt with the burden of prove of the Plaintiff and the Defendant respectively. Section 171 states that;

“On the day appointed for the hearing of the summons, if the person summoned does not appear, then upon proof to the satisfaction of the judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the judge may order immediate possession to be given to the plaintiff, which order shall have the effect of and may be enforced as a judgment in ejectment.”

9. Section 172 deals with the Defendant’s burden of prove where it states that:

“If the person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit”.

10. The proceeding under this summary procedure constitutes two main limbs. The first is that the onus of the Plaintiff to satisfy the court that he is the last registered proprietor or a lessor as defined under section 169 (a), (b) and (c) of the Act. Once the Plaintiff satisfied the first limb, the burden will shift on the Defendant to prove that he has a right to possess of the land.

11. The burden of satisfying the court a right to the possession to the land by the Defendant was rightly outlined in **Morris Hedstrom Limited-v- Liaquat Ali** CA No: 153/87 , where it was held that:

“Under Section 172 the person summonsed may show cause why he refused to give possession of the land and if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right, must be adduced.”

Accordingly, the defendant is only required to adduce some tangible evidence to establish a right to possession or the existence of an arguable case for such right to defeat the Plaintiff's claim.

D. ANALYSIS

12. The Defendant did not dispute the existence of the tenancy agreement between the parties, wherefore the onus is on the Defendant to satisfy the court that they have a right to the possession of this premises.
13. The tenancy agreement entered by the parties has specifically stated that the tenant shall be responsible for fulfilling the requirements of the responsible authorities such as Suva City Council wherever necessary. The parties have further agreed in the tenancy agreement under the heading of "termination" that the landlord reserves the right to give notice and evict the tenant if the rent remains unpaid for more than seven days or for any objectionable act by the tenant.
14. In accordance with the terms in the tenancy agreement, it is the responsibility of the Defendant to comply with the requirements of the Suva City Council. The Defendant could not blame the Plaintiff for such failure. The Plaintiff is dully authorized to give notice of termination to the tenant on the ground of such failure as such act would constitute an objectionable act by the tenant pursuant to the termination clause of the agreement. Wherefore, I do not find that the pending proceedings instituted by the Suva City Council against the Defendant on the ground of operating a business without a proper health and business license gives them a right to the possession of the land under Section 172 of the Act.
15. I now turn to the issue of payment of rent by the Defendant directly to the bank account of the Plaintiff after the notice of termination was issued. The Plaintiff specifically stated in their affidavit in reply that they never advised or authorized the bank to receive the rent money from the Defendant nor the Defendant to deposit the rent in the bank. It was the Defendant's own act to deposit the money into the Plaintiff's general bank account which normally has many interactions. The Plaintiff denies that they had no intention to enter

into a new tenancy by accepting the rent deposited by the Defendant subsequent to the notice of termination. In view of the reasons discussed above, I am satisfied that the Plaintiff had no intention to receive the rent at the time it was deposited by the Defendant into their general account.

E. CONCLUSION

16. Having considered the foregoing reasons, I hold that the Defendant has failed to satisfy the court that they have a right to the possession of this property pursuant to section 172 of the Act. I accordingly make following orders, that;

- i. The Plaintiff is granted vacant possession of the premises located on the land described as Crown / State Lease more appropriately described as Crown Lease No 697, section 68 on Lot 3, otherwise commonly referred to as 54 Victoria Parade (part of);
- ii. The Plaintiff is awarded with cost of \$1000, assessed summarily.

Dated at **Suva** this 17th day of **April, 2014**.



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R.D.R. Thushara Rajasinghe
Acting Master of High Court, Suva