

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 233 of 2014

BETWEEN : **BIJEND PRASAD RAM** of TropicalHealth Incorporation Fiji, a limited liability company of 361, Waimanu Road, Suva.
1ST PLAINTIFF

AND : **TROPICALHEALTH INCORPORATED (FIJI) LIMITED** of 361 Waimanu Road, Suva
2ND PLAINTIFF

AND : **FIJI NATIONAL UNIVERSITY** an educational institution of higher learning of Nasinu, Kings Road, Suva.
1ST DEFENDANT

AND : **POASA KOROITAMANA** an employee/agent of the Fiji National University, Suva.
2ND DEFENDANT

Counsel : **Mr. I. Fa for the Plaintiffs**
Mr. B. Singh for the Defendants
Dates of Hearing : **13 October, 2014**
Date of Judgment : **22nd October, 2014**

JUDGMENT

INTRODUCTION

1. The Plaintiffs filed a writ of summons claiming injunctive relief restraining 1st and 2nd Defendants their servants and agents from interfering with their right to occupation in the premises at no 361 Waimanu Road, Suva. The said premises including the chattels were mortgaged to the Bank of Baroda and upon default of installments they were sold in mortgagee sale to the 1st Defendant. The 1st Defendant purchased them from the mortgagee sale and sale and purchase agreements were entered between the mortgagee and the 1st Defendant. The full payment of the sale amount was paid, but the title could

not be transferred due to a caveat being filed by the Plaintiff regarding the land which was removed by an order of the court. The mortgagee requested the Plaintiff to vacate the premises upon the execution of the sale and purchase agreements and without this fact being revealed the Plaintiff obtained an order against Defendants to remain in occupation. Though the 1st and 2nd Defendants were served with summons they did not appear on the summons. The order to remain in possession was obtained in their absence of the Defendants, due to their own default of appearing on the first date.

FACTS

2. The 1st Plaintiff is a director and shareholder of the 2nd Plaintiff. The 1st Plaintiff had obtained a finance facility from Bank of Baroda for the development of the 2nd Plaintiff as a private hospital and mortgaged the same to the said Bank.
3. The first Plaintiff who is a medical practitioner also conducted his professional services on a part of the premises.
4. Due to the default of the payments under the mortgage, the Bank of Baroda conducted a mortgagee sale in 2013, and as a successful tenderer 1st Defendant's purchase price was accepted and it was paid and two sale and purchase agreements were entered between the mortgagee bank and the 1st Defendant relating to the land and also chattels.
5. The mortgagee had requested the Plaintiff to vacate the premises on 24th September, 2013, but he had refused to vacate the premises. This letter is marked as 'C' to the affidavit Narendra Prasad dated 23rd September, 2014.
6. In the statement of claim which contained only 4 paragraphs the Plaintiffs are stating that Defendants are **unlawfully obstructing and preventing the 1st Plaintiff from occupying and conducting its business** from the premises at No 361 Waimanu Road Suva. The basis of the application for possession is the failure to transfer the property in 1st Defendant's name.

7. The 1st Plaintiff had lodged a caveat on the said property on **21.12.2013**. **The hearing of the said removal of the caveat was before the Master on 25th February, 2014** and the Ruling was delivered on **20th June, 2014** ordering the removal of the said caveat. At the moment there is no order preventing the registration of the transfer on the land registry.

ANALYSIS

8. The Plaintiffs admit the mortgage of the property to the Bank of Baroda and also admit the mortgagee sale. The Plaintiffs also admit the entering in to the sale and purchase agreements between the mortgagee Bank and the 1st Defendant.
9. Further, the Plaintiffs admitted a second mortgage to the FNPF Investment Limited on the same property in issue.
10. According to the affidavit in support the Plaintiff had instituted a separate action against the Bank of Baroda and FNPF Investment Limited and it is pending before the court. At the time of this application there is no injunction against the transfer of the said property.
11. A caveat placed by 1st Plaintiff on 21.12.2013 was removed on 25th June, 2014 pursuant to the order of the Master and the transfer of the said property could not be entered due to the said caveat being placed on the property.
12. The 1st Defendant and FNPF Investment had also subsequently placed a caveat, but the main obstacle in the execution of the sale and purchase agreement was the caveat placed by the 1st Plaintiff which was removed by the order of the Master.
13. The contention of the Plaintiffs are that since the property is yet to be transferred to the 2nd Defendant the 1st Plaintiff is entitled for the peaceful occupation of the property. This is not correct as the property is admittedly subjected to a mortgage which was defaulted by the Plaintiffs .So the rights of the mortgagor are subject to the mortgagee's right in terms of the mortgage. The mortgagee has a right of possession in terms of the mortgage

hence the mortgagee had issued a notice to vacate the premises on 24th September, 2013. (the letter was sent by the solicitors for the Bank on behalf of the mortgagee). So the right to possession of the Plaintiff was not absolute and after the quit notice there is no right to remain in possession.

14. In the affidavit filed on behalf of the Defendant seeking the vacation of the injunction the sale and purchase agreements of the land and the chattels are and annexed. The sale and purchase agreements of the land and chattels expressly state that upon the execution of the said agreements the possession was given to the 1st Defendant. So the mortgagee had already upon the execution of the sale and purchase agreements, assigned the right of possession to the 1st Defendant and this was also informed to the Plaintiffs on 24th September, 2013.
15. Instead of granting vacant possession the mortgagor had remained in a part of the property where he is conducting his private practice as a medical practitioner, and he had also lodged the caveat which was ultimately removed by the order of the Master in June, 2014.
16. This would leave the Plaintiff having no right to possession of the said premises from the date of execution of the said sale and purchase agreements, and though he was allowed to remain in possession by the 1st Defendant there was no legal basis to remain in possession of the premises when the mortgagee had issued a notice to vacate the premises upon the completion of the mortgagee sale .It should also be noted that said notice to quit confirmed the acceptance of the full payment for the mortgagee sale.
17. The letter of 27th September, 2013 to the 2nd Plaintiff clearly indicates that the Plaintiffs did not have any right to possession. So the Plaintiffs were aware of these facts and suppressed those facts to the court in making this application. The said letter is annexed 'C' to the affidavit of Narendra Prasad dated 23rd September,2014 and states as follows

'We act for Bank of Baroda, who as you are aware has conducted Mortgagee Sale of your property and chattels due to default in the repayment of the mortgage debt.

Our client has now entered into sale and Purchase Agreement for the sale of the mortgaged property and chattels to Fiji National University who have fully paid off the purchase price.

One of the conditions of the sale is that possession of the said property and the chattels will be given to Fiji National University upon signing of the Sale and Purchase Agreement.

We therefore notify you to quit and deliver vacant possession of the said property and the chattels of Fiji National University within the next 7 days.' (emphasis mine)

18. So, the Plaintiff was informed as far back on 23rd September, 2013, more than a year ago, about the executed sale and purchase agreement relating to the land and the chattels the Plaintiffs do not have a right to occupy the premises or remain in occupation in violation of the said notice of the mortgagee. Initially, this letter was not produced to the court when the injunctive order was granted.
19. **In the affidavit of Narendra Prasad dated 23rd September, 2014 it is further stated in paragraph 30 that continuing possession for the Plaintiffs are a security threat as there are costly medical equipments and supplies stored in the property. It was also stated that the Plaintiff had occupied the premises and used electricity and water and other utilities of the premises without any payment to the 1st Defendant for more than a year.**
20. In **American Cyanamid Co v Ethicon Ltd** [1975] 1 All ER 504 at 509 Lord Diplock held,
- 'The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial....'*

Futher Lord Diplock held, at p 5010 held,

'So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought....'

*'As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. **If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.** If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason this ground to refuse an interlocutory injunction.'*

21. In the statement of claim the 1st Plaintiff states that he was unlawfully prevented or obstructed by he Defendants from engaging in business at premises no 361, Waimanu Road, Suva. In the said statement of claim the Plaintiffs are seeking continuation of the possession of the premises. The 1st Plaintiff has been conducting his medical practice from a part of the premises, but the entire premises and the chattels were sold to the 1st Defendant through a mortgagee sale. The mortgagee sale was completed by the execution of the sale and purchase agreements and also full payment for the same.
22. This is the premises that was mortgaged to the Bank of Baroda and their lawyers had issued a notice to quit the premises in 2013 as the mortgagee sale was completed with the execution of sale and purchase agreements for the land and chattels and the right to possession was assigned to the 1st Defendant. So there is no prospect of Plaintiffs obtaining the permanent injunction for possession of the premises. In the circumstances

the Plaintiffs do not have a right to remain in possession and the first test for the grant of injunction fails and I need not venture more to consider the balance of convenience.

23. Even if I am wrong on that, the balance of convenience also favours the Defendants. The 1st Plaintiff had remained on the premises despite the notice to quit issued by the mortgagee. The Defendants state that continued occupation of the 1st Plaintiff also posed a security threat due to the nature of the equipment and supplies stored in the premises. The apprehension of the Defendants is a factor that favours balance of convenience to them. In any event after the full payment for the mortgagee sale they should not be deprived of the possession. The mortgagee sale was a *fait accompli* and there is no right of the mortgagor or his agents to remain in possession of the premises. The payment of the full price for the mortgagee sale and the notice to quit was concealed by the Plaintiffs in their affidavit in support of injunction. All these facts were disclosed to the Plaintiffs by the mortgagee on or before 24th September, 2013. That was nearly one year ago!

24. In *Ghafoor and Others v Cliff and Others* [2006] 2 All ER 1079 at 1091, David Richards J held:

*'Secondly, the claimants submit that Mr. Cliff's affidavit in support of the application contained serious misrepresentations and failed to make full and frank disclosure of relevant facts. These are serious criticisms in any case, but the importance of accurate evidence is particularly acute on an application without notice, and the duty of disclosure on such an application has been stressed by the courts on many occasions (see, for example, *Fitzgerald v Williams, O'Regan v Williams* [1996] 2 All ER 171 at 177, [1996] QB 657 at 667-668 per Bingham MR). The principles are well established and well known on applications without notice for injunctions and other interim relief, but they are fundamental to the proper functioning of the court's process on any application without notice. It is of course the very fact that the application is made without notice to other interested parties which makes these principles so important. Other parties do not have the opportunity to correct or supplement the evidence which has been put before the court' (emphasis is mine)*

25. The initial application was mad ex parte but it was converted to *inter partes* by the court considering the facts submitted *ex parte*. Though the notice of motion was served to the Defendants, there was no appearance on behalf of them on the first date and considering the facts before the court an injunctive order was granted. The non appearance for the Defendant and specially the fact that mortgagee granting the possession of the premises to the Defendant and the eviction notice of the mortgagee to the Plaintiff were not revealed at that time. So, even though the matter was converted to *inter partes* the initial order to remain possession was obtained without revealing a material fact to the court.

CONCLUSION

26. The Plaintiffs failed to establish a serious question of law to be tried at trial against the Defendant in this action for the continuation of the possession of the premises. With the execution of the sale and purchase agreements for the land and the chattels, the immediate possession was assigned to the 1st Defendant, hence there is no right to possession remaining with the Plaintiffs who were the mortgagors for the said premises. The order to remain in possession of the property extended to the 22nd October, 2014 (to day) is vacated forthwith. The motion for injunction seeking possession is struck off. The cost of this application is summarily assessed at \$1,500.

FINAL ORDERS

- a. The order of the court to remain in possession is vacated forthwith.
- b. The motion of the Plaintiffs seeking injunctive relief filed on 13th August, 2014 is struck off.
- c. The cost of this application is assessed summarily at \$1,500.

Dated at Suva this 22nd day of October, 2014.

