

IN THE HIGH COURT OF FIJI
AT LAUTOKA
WESTERN DIVISION

Civil Action HBC 105 of 2012

BETWEEN : **ANIL SABHARWAL** of Varoka, Ba, Fiji Consultant.
Plaintiff

AND : **VIJAY PRASAD** of Uluisila, Sigatoka, Land Owner.
Defendant

Solicitors : Nacolawa & Co. for the Plaintiff
Sherani & Co for the Defendant

R U L I N G

INTRODUCTION

1. On 11 May 2012, the plaintiff filed a writ of summons and statement of claim against the defendant.
2. The plaintiff sues the defendant pursuant to an Agreement he alleges was entered into by him and the defendant on 02 October 2004.
3. By that Agreement, the defendant allegedly engaged the plaintiff to sell some property of the defendant, for the defendant, for a commission.
4. As pleaded at paragraphs 3 and 4 of the statement of claim, by that agreement, the defendant allegedly gave the plaintiff:

“....exclusive rights....to have the said land sold....”

And

“....on the Commission of 21.8% inclusive of the Purchase Price”.

5. The land in question is described as Crown Lease No. 195311 being Lot 2 D.P. 3597 known as Bainivore Subdivision of Nadorga/Navosa.
6. The plaintiff also pleads in paragraph 5 of his statement of claim that:

“....shortly after the signing of the first Agreement, the Defendant without the Plaintiff’s knowledge, entered into another Exclusive Agreement with ET Real Estate & Services for the sale of the same land which was agreed upon with the Plaintiff”

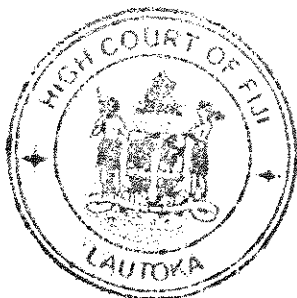
7. The plaintiff pleads that the agreement with ET Real Estate & Services never eventuated and by “**around 1st week of March 2005**” as he pleads

in paragraph 7 of his claim, he had lined up several potential buyers who were interested in the land. Weary of the defendant's deal with ET Real Estate & Services, the plaintiff then entered into a new agreement with the defendant dated 01 June 2005 wherein the defendant would promise 30% commission to the plaintiff.

8. To cut a long story short, it is alleged that the property in question was eventually bought by one of several people that the plaintiff had lined up but the defendant failed to honour their agreement and pay commission to the plaintiff. The plaintiff claims \$105,000 being 30% of the sum for which the property was bought plus interest at the rate of 13.5 %.
9. On 22 June 2012, the defendant filed a statement of defence and counter claim. The counter-claim is founded on an allegation that the plaintiff had placed a caveat on the said property pursuant to the alleged Agreement. The said caveat resulted in the defendant losing potential buyers.
10. On 03 August 2012, a default judgement was entered against the plaintiff on the defendant's counter-claim followed by a Summons for Assessment of Damages filed on 16 August 2012. This was supported by an affidavit sworn by the plaintiff on 28 August 2012.
11. This was followed by an amended Notice of Motion filed on 08 October 2012 seeking the following Orders:
 - (a) That the Default Judgment entered against the Plaintiff on the 3rd day of August, 2012 be wholly set aside forthwith and the leave be granted to the Plaintiff to file reply to Defence and Counter Claim.
 - (b) That there be a stay of execution of the Summons For Assessment of Damages against the Plaintiff called on the 9th October, 2012 for hearing be stayed till determination of the Plaintiff whole action.
 - (c) That there be abridgement of service to one day.
 - (d) Such further and further relief as this Honourable Court deems just and fair.
12. The amended Notice of Motion was supported by an **Amended Affidavit In Support** sworn by the plaintiff on 05 October 2012. I note that the said Amended Affidavit has paragraphs 3(a) to (g) and 4(a) to (d) underlined in red as if to demarcate the parts that have been added to the original affidavit of 28 August 2012.
13. At this juncture, I must say that it is totally inappropriate for a deponent to file an affidavit to amend an earlier affidavit. The High Court Rules 1988 only requires the underlining in red to be done when it comes to amending

a pleading. An affidavit is not a pleading. It is a sworn statement the purpose of which is to be used in evidence.

14. I refuse to accept the above affidavit.
15. Having said that, I note in any event that the affidavit in question only sets out the background as to how the agreement that the plaintiff alleges was entered into between the parties. At the end of the day, the question remains whether such an agreement was enough to sustain a caveatable interest.
16. As a rule, an interest is caveatable if it is proprietary in nature and not merely contractual.
17. In this case, the counter-claim is premised on the allegation that the caveat that the plaintiff had put on the property was unlawful.
18. To succeed in setting aside the default judgement, the plaintiff must establish amongst other things that he has a defence on the merits.
19. To be able to establish that he has a defence on the merits, he must be able to show at least that the purported interest on which his caveat was based was proprietary in nature.
20. The agreement that he alleges he had with the defendant, assuming it is proven, does not give the plaintiff a proprietary interest.
21. Accordingly, I dismiss the application to set aside the default judgement on the defendant's counter-claim. The plaintiff's case against the defendant must now take its normal course as well as the assessment of damages for the defendants counter claim.
22. Case adjourned to **Monday 01 May 2017 at 10.30 a.m. for mention.** Costs to the defendant which I summarily assess at \$800-00 (eight hundred dollars only).



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Anare Tuilevuka
JUDGE
24 April 2017.