

IN THE HIGH COURT OF FIJI AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 342 of 2022

BETWEEN

BRENDON HANNON of Anchorage Resort, Vuda,
Businessman, Lautoka.

PLAINTIFF

AND

ASHOK KUMAR aka **ASOK KUMAR** of Togomasi, Nadi,
Retired, as the **ADMINISTRATOR OF THE ESTATE**
OF RAM BALI.

DEFENDANT

Counsel : Mr. Fa S. with Ms. Donu for the Plaintiff
Ms. Mataika P. with Ms. Pillay S. for the Defendant

Date of Hearing : 06th September 2023

Date of Ruling : 12th October 2023

RULING

(On the summons for Summary Judgment)

[1] The plaintiff instituted this action seeking the following orders against the defendant:

1. An order for specific performance of the agreement dated August 2017 and the verbal agreement of the 20th of February 2018;
2. Further or alternatively, an order that by virtue of being the Administrator of the Estate of Ram Bali, the defendant refund the sum of \$72,500.00 (Seventy-Two Thousand Five Hundred Dollars) that was paid to the same by the plaintiff;
3. Further or alternatively, a declaration that the defendant as the Administrator of the Estate of Ram Bali, holds the sum of \$72,500.00 (Seventy-Two Thousand Five Hundred Dollars) as constructive trustee for the plaintiff;
4. An order that the constructive trustee for the plaintiff, the defendant deliver up and pay to the plaintiff the said sum of \$72,500.00 (Seventy-Two Thousand Five Hundred Dollars);
5. Interest from 18th August 2017;
6. Costs on Solicitor Client basis; and
7. Such further or other orders this Honourable Court deems just and equitable.

[2] The plaintiff on 16th February 2023 filed an inter-partes summons seeking the following orders:

1. That this application be returnable instanter;
2. An order for specific performance against the defendant, requiring the defendant to subdivide Crown Lease No. 16006 on Lot 7 on Plan No. (d) ND 5015 into 2 Lots, the First Lot comprising the area surrounding the house on the same, and the Second Lot comprising the same area on the same and which is to be sold to the plaintiff and the defendant

have entered into a sale and purchase agreement for the same at a sale price FJ\$725,000.00 (Seven Hundred and Twenty-Five Thousand Fijian Dollars);

3. In the alternative, and order by virtue of being the Administrator of the Estate of Ram Bali, the defendant refund the sum of FJ\$72,500.00 (Seventy-Two Thousand Five Hundred Fijian Dollars) that was paid to the same by the plaintiff.
4. An order that the statement of defence be struck out or dismissed;
5. An order that costs of this application be paid by the defendant; and
6. Such further or other orders this Honourable Court deems just and equitable.

[3] Order 86 rules 1 and 2 of the High Court Rules 1988 provides:

- (1) In any action begun by writ indorsed with a claim –
 - (a) for specific performance of an agreement (whether in writing or not) for the sale, purchase, exchange, mortgage or charge of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages, or
 - (b) for rescission of such an agreement, or
 - (c) for the forfeiture or return of any deposit made under such an agreement, the plaintiff may, on the ground that the defendant has no defence to the action, apply to the Court for judgment.
- (2) An application may be made against a defendant under this rule whether or not he has acknowledged service of the writ.

[4] In this matter the plaintiff's position is that he entered into a memorandum of agreement with Vijay Kumar who was the original Administrator of the Estate of Ram Bali. After he passed away the defendant was admitted as the administrator. The defendant does not admit that the plaintiff paid the money. The plaintiff tendered in evidence a document (BH3) as the evidence of payments said to have been made by him. However, this document does not show who prepared it and also there is no signature of the author of the said document. The contents of

the said document can only be clarified at the trial if it is tendered in evidence by the plaintiff.

- [5] The money purported to have been paid to Vijay Kumar did not belong to him personally but it was part of the estate of Ram Bali and it belongs to all the beneficiaries of the Estate of Ram Bali and not only to Vijay Kumar. The court, before making any order sought in the summons for summary judgment, must be satisfied that this money was credited to the Estate of Ram Bali.
- [6] The defendant is not personally liable to pay this amount to the plaintiff because he is only the representative of the Estate of Ram Bali. If the court decides to make an order for payment, the defendant is only liable to pay out of the Estate funds and not personally. If Vijay Kumar had spent that money for his own personal use the court cannot hold the Estate of Ram Bali or the defendant is liable to refund the money. All these issues cannot be decided by affidavit evidence without hearing the parties.
- [7] The learned counsel for the defendant submitted that there is no properly executed sale and purchase agreement between the parties. The only document available is a Memorandum of Agreement which has been signed by the two parties and it does not say who the 3rd signatory is. The question arises whether this is a legally enforceable document and this issue too must be decided at the trial.
- [8] **Metalworks & Joinery Ltd v Fiji Islands Revenue & Customs Authority** [2010] FJHC 110; HBC309.2009 (8 April 2010) –

[19] The following passage from the judgment of the Court of Appeal delivered by Greig J in *Australian Guarantee Corporation [NZ] Ltd -v- Mc Beth* [1992] 3 NZLR 54 at 58 is apt in determining the issue before me on the facts and circumstances of this case:-

"The summary judgment procedure is a simple expeditious way to enable a plaintiff to obtain judgment where there is no real defence to the claim made see **Pemberton -v- Chappell** [1986] NZCA 112; [1987] 1 NZLR 1 AT

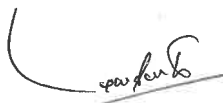
2. The essence of the procedure is the plaintiffs own verification by affidavit of his own statement of claim and the allegation made in it; **Harry Smith Car Sales Pty Ltd -v- Claycom Vegetable Supply Co Pty Ltd** [1978] 29 ACTR 21. There has to be balancing between the right of the defendant to have his day in court and to have his proper defences explored and the appropriate robust and realistic approach called for by the particular facts of the case: see **Bilby Dimock Corporation Ltd -v- Patel** [1987] NZCA 193; [1987] 1 PRNZ 84 and **Cegami Investment Ltd -v- AMP Financial Corporation [NZ]** [1990] 2 NZLR 308 at p.313. Although the onus is upon the plaintiff there is upon the defendant a need to provide some evidential foundation for the defences which are raised. If not the plaintiffs verification stands unchallenged and ought to be accepted unless it is patently wrong."

[9] In this case, as I have stated above, the defendant has raised several issues which cannot be decided on affidavit evidence without hearing the parties.

[10] For the reasons set out above the makes the following orders.

ORDERS

1. The summons for summary judgment is struck out.
2. The plaintiff is ordered to pay the defendant \$1000.00 as costs of this application.


Lyone Seneviratne

JUDGE



12th October 2023