IN THE COURT OF APPEAL OF TONGA
NUKU'ALOFA REGISTRY

AC 11/2019
(CV 51/2009)

BETWEEN	**FOLAU KOTO and JACINTA KOTO** Appellants
AND	**AUSTRALIA NEW ZEALAND BANKING GROUP** Respondent

Coram:	Whitten P Blanchard J Hansen J
Counsel:	Mr D Corbett for the Appellants Mrs DE Stephenson for the Respondent
Date of Hearing:	23 March 2020
Date of Judgment:	27 March 2020

JUDGMENT OF THE COURT

JUDGMENT OF THE COURT

Introduction

[1] The appellants applied unsuccessfully to set aside a default judgment entered against them on 13 May 2009 for $70,702.80 (plus interest) on a housing loan and the sum of $19,893.78 (plus interest) on a personal loan. They appeal against the judgment of Niu J refusing their application.

Background

[2] The appellants are husband and wife. In 2005 they obtained a housing loan of $65,000 and a personal loan of $10,000 from the respondent. The housing loan was to repay an existing loan of $45,000 to another bank and to fund improvements to their home. Later in 2005, a further personal loan of $6,500 was approved, increased by $10,000 in January 2017. Proceedings were issued and judgment by default obtained after defaults began in 2008.

[3] The application to set aside the Judgment was made on 2 August 2019. It was supported by an affidavit by the first appellant in which he claimed that, by four payments in September and October 2005, the respondent had "by fraud" increased the amount of the housing loan by $20,000. He said he and his wife "could not" file a defence to the proceedings against them as there was no personal service on them and they were "shocked" to be advised that judgment had been entered against them.

[4] In opposing the application, the respondent filed an affidavit by 'Ana Fono, a bank officer, who explained that the $20,000 was for house renovations that was drawn down by way of four payments made in September and October 2005. She said at no time did the appellant question the loan arrangements or balances owed. She explained that after judgment was entered there were discussions with the appellants and the respondent agreed to accept repayments at a reduced level. She chronicled the following further actions in relation to the indebtedness:

- In 2012, after further defaults, the appellants unsuccessfully attempted to stay execution of the Judgment.
- A writ of distress issued in 2013.
- The appellants issued civil proceedings against the respondent for damages in 2014. These were not pursued.

- A foreclosure notice was served on 28 March 2019 and, after the expiration of 14 days, the respondent took possession of the appellants' property. On inspection the respondent discovered the property had been rented for 13 years. The rent had been paid to the appellants.

Decision appealed from

[5] The application was made pursuant to Order 14 Rule 4 of the Supreme Court Rules 2007 which reads as follows:

> "(1) A judgment entered under rule 1 maybe set aside if the defendant satisfies the Court that:
>
> (a) there was good reason for the failure to file a defence in time;
>
> (b) there is an arguable defence; and
>
> (c) the plaintiff will not suffer irreparable injury if the judgment is set aside.
>
> (2) Application notice under paragraph (1) shall be supported by an affidavit."

[6] Before Niu J, the appellants contended they had not filed a defence because they had not been properly served, the first appellant because he was served at his place of work instead of his place of residence, the second appellant because the certificate of service stated that she was served at her residence in Houmakelikao when her residence was in Fangaloto.

[7] Niu J held there was no irregularity in the mode of service. He said service is validly effected if it takes place anywhere in the Kingdom. He was not satisfied there was good reason for the appellants' failure to file a defence in time.

[8] After reviewing the affidavit evidence, the Judge rejected the appellants' claim that they did not receive the additional $20,000. Among other things, he noted that the appellants had carried out the kitchen renovations which the additional sum was borrowed to fund.

[9] Finally, the Judge found the appellants had "no justifiable reason" for making the application 10 years after judgment was entered against them. He dismissed the application with the appellants to pay costs on a solicitor and client basis.

Grounds for appeal

[10] The appellants challenge the Judge's findings in relation to their reasons for failing to file a defence in time and whether they have an arguable defence. They continue to

maintain that they were not properly served and that they did not receive the additional $20,000.

Discussion

[11] In this Court, Mr Corbett continued to maintain that the appellants had not been served as required by law. He also submitted that the process server was not authorised to serve documents under the Supreme Court Rules.

[12] The contention that service was not effectual because the first appellant was served at work and the second appellant's place of residence incorrectly described in the certificate of service was rightly rejected by the Judge. As he said, service is validly effected if it occurs in the Kingdom. The precise locality is irrelevant.

[13] The process server provided a certificate of service in accordance with the Rules. The certificate complied with Order 11 Rule 4. There is no requirement that a process server disclose the capacity in which he acted. When the appellants disputed service when seeking a stay of execution, the process server swore an affidavit confirming that he was employed as a service agent. He was plainly authorised to serve documents pursuant to Order 11 Rule 3(2). The application for a stay was dismissed. The decision was not appealed.

[14] The evidence establishes that the appellants were personally served in accordance with the Rules. The Judge was right to find they had no good reason not to file a defence to the proceedings.

[15] The evidence that the appellants received the additional $20,000 is overwhelming. The affidavit by Ms Fono provides compelling evidence in the form of bank records that the funds were credited to the appellants' account and withdrawn by them. Their claim not to have received the money and of fraud on the part of the respondent cannot stand against Ms Fono's evidence. It is also inconsistent with their actions at the time. When the increased personal loans were arranged in 2005 and 2007, they signed letters which acknowledged the balance of the housing loan which included the $20,000. After judgment was entered, they had discussions with the respondent that led to repayment of the personal loan and a restructuring of the housing loan to reduce the amount of weekly repayments. The appellants signed the letter of variation. Later, in 2013, their counsel did not question the amount of the judgment or raise concerns about the advance of $20,000. Their counsel signed a joint memorandum agreeing to the issue of a Writ of Distress for the amount of the judgment plus interest and costs.

[16] The appellants did not pursue their civil claim which alleged fraud against the respondent. They did not take any steps to set aside the judgment until the respondent acted to enforce its mortgage.

[17] Like the Judge, we are satisfied that there is no arguable defence to the claim. The appellants' application to set aside the judgment was without merit and the Judge was clearly right to dismiss it.

Result

[18] The appeal is dismissed with the appellants to pay costs to be fixed by the Registrar.

Whitten P

Blanchard J

Hansen J