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IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

CV 51 of 2009

BETWEEN : ANZ BANKING GROUP LTD

- Plaintiff

AND : 1. TALIFOLAU KOTO
2. JACINTA KOTO

- Defendants

BEFORE HON. JUSTICE NIU

Counsel: Mr. D. Corbett for applicant defendants
Mrs. D. Stephenson for respondent plaintiff

Hearing: On application to set aside default judgement on 2 October 2019

RULING ON SET ASIDE APPLICATION

[1] The defendants have applied for an order that a default judgement in favour of the plaintiff which had been given by this Court against them on 13 May 2009 be set aside. The default judgement was, and is, in the sum of $70,702.80 plus interests at 12.25% per annum thereon from 9 May 2009 in respect of a housing loan until paid, and in the sum of $19,893.78 plus interests at 17.75% per annum thereon from 9 January 2009 until paid in respect of a personal loan.

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Applicants' case

[2] They say by way of sworn affidavits that in 2005 they had borrowed $45,000 from the plaintiff to pay off a housing loan they had with the Reserve Bank of Tonga (of $25,078) and to pay off a personal loan they had with the Westpac Bank of Tonga (of about $7,000) and to renovate their garage into a kitchen ($13,000).

[3] They say that after they had been given and charged for that $45,000 loan, the plaintiff went ahead on its own, and without their (the defendants') knowledge or consent, charged on to their housing loan account an extra $20,000, but which sum they say was never paid out to or received by them. They say that as a result of that additional sum being charged on to their account, their loan balance was wrongfully inflated to $66,802.20, instead of being only $45,000. They say that that was wrongful and fraudulent.

[4] They say that they were not aware of this wrongful addition until after they were served with the default judgement in 2009, and that they repeatedly asked the plaintiff for documents to show that they had applied for that extra $20,000 and that extra $20,000 was in fact paid out to them, but the plaintiff had failed, despite its promises to do so, to provide them with those documents up to now.

Respondent's case

[5] The respondent by way of sworn affidavit denies the applicants' case. It says that the additional $20,000 was applied for by the applicants and it was paid to the access account and the applicants had withdrawn the total $20,000 from the access account themselves. It says that what happened was this:

(a) At the time of approval and pay out of the loan sum of $45,000, it was disbursed as follows:

(i) $25,078.00 was paid to the Reserve Bank to pay off that debt;

(ii) $19,917.94 was paid to the applicants access account.

(b) At that time, the access account was overdrawn to a sum of $6,498.32 which had to be paid off first. The sum of $19,917.94 was thereby reduced to

$13,419.62. On the same day, $6,214.84 was applied to pay off the personal loan of the applicants at Westpac Bank of Tonga. The balance was then only $7,204.78.

(c) That balance was not enough for the kitchen renovation required and the applicants applied for and the respondent approved an extra $20,000 for the kitchen renovation, and that it be paid out to the applicants in progress payments as was normal with construction loans. The extra $20,000 was accordingly paid out as the kitchen work progressed as follows:

(i)	12/9/2005	$5,000,
(ii)	26/9/2005	$5,000,
(iii)	17/10/2005	$5,500,
(iv)	25/10/2005	$4,500,

(d) In addition to that extra $20,000, the applicants applied for and were granted a further sum of $6,500 as a personal loan on 22/12/2005.

(e) In January 2007, the applicants applied for further sum of $10,000 to purchase a television set and to pay for other commitments. That was approved and that further $10,000 was paid to the applicants' access account as personal loan. So that in January 2007 the housing loan account was at $65,844 and the personal loan account was at $18,841.

The law

[6] The applicable law is the Supreme Court Rules 2007. Order 14 Rule 4 provide as follows:

> ***"O.14 Rule 4. Setting aside judgement***
>
> *(1) A judgement entered under rule 1 may be set aside if the defendant satisfies the Court that:*
>
> *(a) there was a 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 judgement is set aside.

(2) Application notice under paragraph (1) shall be supported by an affidavit."

The evidence

[7] That law places the burden of proof of all 3 matters ((a), (b) and (c)) on the defendant. In respect of requirement (a), the first defendant says in his affidavit of 2 August 2019:

> "19. We were shocked that in May 2009 we received judgement in default of defence against us. We could not file a defence when there was no personal service of the Writ of Summons and Statement of Claim on us.
>
> 20. I have been informed by my new legal counsel that service cannot be effected at my place of work, ITech Company Ltd, unless there is an order for substituted service. There was no such order for substituted service.
>
> ...
>
> 31. The Court provided me with certificate of services filed 31 March 2009 of service by Police Officer 'Ake of the writ and claim. I dispute these certificates. There was never any personal service of the writ and claim on us.
>
> 32. The Court also provided me an affidavit of Luseane Manu sworn 27th April 2009 in support of judgement in default of defence referring to personal service complete on the applicants and which we dispute. There is no supporting affidavit of Police Officer 'Ake confirming service."

And in a joint affidavit of the Applicants dated 26 September 2019, the second defendant says in paragraph 1 (ii):

> "(ii) A certificate has allegedly been provided by 'Ofisi 'Ake that the Writ and Claim was served on me as 2nd Defendant at Houmakelikao. In

2009 me and my husband did not live at Houmakelikao but live at Fangaloto which is some distance away."

[8] When I had read that statement of the second defendant, I had understood her to mean that she could not have been served at all because she, and her husband (the first defendant) were living in Fangaloto at the time. However, during the hearing of this application in Court, Mr. Corbett agreed that the couple were living in a spot which was on the "border" of Houmakelikao and Fangaloto so that it was said to be Fangaloto by some people and to be Houmakelikao by other people, but that the fact was the couple were living in the same home from 2005 (the time of the loan) and the time of service of the claim in 2009, and that they did not move from there until about 2011.

[9] The defendant applicants are therefore saying in their sworn affidavits that they have a good reason for not filing their defence to the plaintiff's claim in time because:

(a) the first defendant was not properly served because he was being served at his place of work, namely, his company's premises, and not at his place of residence, without a Court order approving such substituted service, and

(b) the second defendant was not properly served because the certificate of service stated that she was served at her residence in Houmakelikao but her residence was in fact in Fangaloto.

[10] I have to say that there is no law (that I am aware of) that requires service of a claim to be carried out on the defendant at the defendant's residence. A service is validly made if made anywhere within the Kingdom wherever the defendant can be found whether he lives there or not and a substituted service is only allowed by the Court to be made if the defendant is outside of the Kingdom or cannot be located but that another person, on whom a substituted service can made, would be sure to bring notice of the claim to him.

[11] I am therefore not satisfied, on the sworn evidence provided by the defendant applicants, that service of the plaintiff's claim was not made upon them so as to justify their failure to file their defence to the claim in time. I find that the defendants

have failed to satisfy me that they had a good reason for their failure to file a defence in time as is required by Order 14 Rule 4(1) (a).

[12] As to the requirement (b) of the three requirements of the Rule, namely, that the defendant applicants have an arguable defence to the plaintiff respondent's claim, I am satisfied, on the sworn evidence provided, that they do not. I find instead that the documentary evidence provided and attached to the plaintiff witnesses', 'Ana Fono's, affidavit amply support the disbursement of the total sum of $45,000 which the defendants initially borrowed, leaving only $7,204.78 for the kitchen renovation required by the defendants. They therefore asked for another $20,000 for that purpose and the plaintiff gave it to them and they carried out that renovation thereby increasing their loan from $45,000 to $65,000.

[13] Because the defendants are saying that they did not borrow and were not given that extra $20,000, I asked Mr. Corbett during the hearing whether or not the kitchen renovation was done at all, and he could not say. I would have thought that if they were not done then the defendants may well be right – they never received the extra $20,000. But they do not say that the kitchen renovation was not done. In fact they say in their joint affidavit of 26 September 2019 that they did have the kitchen renovation done. They say that in paragraph 6(v) and (vi). They also say that they purchased a new fridge for $1,500, a new 5 burner gas stove for $1,000, a kitchen cabinet for $2,000 – all for the new kitchen (paragraphs 6(viii), (ix), (x), (xi)). What they do not say is that the money that they used for the kitchen renovations and all these purchases was their own money. I am satisfied that they do not say so because the money they used was the extra $20,000 which 'Ana Fono say in her affidavit that they requested and which the plaintiff gave them as 'Ana Fono has sworn to.

[14] I am therefore not satisfied that the plaintiff had charged an extra $20,000 to the defendants loan of $45,000 to make their loan total come to $65,000, such as the defendants have now claimed in this application, so that they have been liable to $65,000 when they had only received $45,000 from the plaintiff. In fact, I am satisfied that they did receive the total sum of $65,000 and that they knew that they received it because they had asked for it and they had used it for the purpose that

they had told the plaintiff. They were aware of the increased total loan of $65,000 when they signed the variation letter some 2 months later on 22 December 2005 because that letter stated their total liability then at $66,802.00 for their housing loan and $7,200 for the personal loan.

[15] I consider that the defendants have no justifiable basis to make this application at all and I accept that they were and are aware that they do not. They have no justifiable reason why they have only made this application some 10 years after the default judgement was given in 2009. The application has caused unnecessary and unjustified costs to the plaintiff, such that higher costs than normal party/party costs are justified to be awarded to the plaintiff. The plaintiff has applied for such higher costs, namely, solicitor/client costs in paragraph 3.01 of its submissions filed on 1 October 2019 prior to the hearing, in accordance with Order 47 Rule 5(3) of the Rules, and I see no reason not to grant it.

Conclusion

[16] Accordingly, I order that the application of the defendants to set aside the default judgement is dismissed with costs to the plaintiff on a solicitor/client basis, to be taxed if not agreed.

SUPREME COURT TONGA

Niu J

NUKU'ALOFA: 4 October 2019. **J U D G E**