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IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

A. No. 13/84

NZLR 754

BETWEEN IRVING GRAEME ALEXANDER of Whangarei, Camera Retailer

Plaintiff

AND RAYMOND JOHN GIBSON of Tattons Road, Maungatapere, Forestry Contractor

Defendant

Hearing: 13th June, 1984

Counsel: Hislop for Defendant in Support
Reeves for Plaintiff to Oppose

Judgment: 3 July 1984

JUDGMENT OF SINCLAIR, J.

The motion before me as it was originally filed was a motion seeking orders for leave to defend a bill writ but at the hearing application was made to amend the motion to include an application for stay of proceedings or, alternatively, for a dismissal of the bill writ with the Court invoking its inherent jurisdiction in respect of both of these applications. That application from counsel for the Defendant was not opposed and I accordingly allowed it and the matter proceeded.

It is necessary to relate some of the history of this matter so that the true perspective is obtained.

On 27th October, 1983 an action was commenced by the present Plaintiff for $1,833.65 in the District Court at Whangarei under Plaint No. 1956/83. This was a default

action but a statement of claim was filed referring to the purchase of certain camera equipment by the Defendant from the Plaintiff on 8th September, 1983. The statement of claim further alleges that the equipment was paid for by a cheque drawn on the 8th September, 1983 from the National Bank of New Zealand at Whangarei on an account in the name of R. J. and G. M. Gibson, with the cheque apparently being signed by the present Defendant. There is reference in the statement of claim to the cheque being stopped, but just precisely what the cause of action was is not apparent although it appears to be in contract, but it claimed the amount above referred to which was the amount which had been stated in the cheque.

On 3rd November, 1983 those proceedings were served and on the 16th November, 1983 notice of intention to defend was filed by the Defendant. One month later on 16th December, 1983 a statement of defence and set off was filed and the defence in fact turns on the contents of the set off.

The allegations in the statement of claim were admitted save for the fact that the Defendant contended that he did not owe the $1,833.65 to the Plaintiff. The set off alleged that in September, 1982 the Plaintiff purchased from the Defendant an irrigation system for $1,500 and payment was made by a cheque post-dated to the 31st March, 1983. When the cheque was presented payment was stopped and there is an allegation in the statement of defence that there had been no complaint in relation to the irrigation system and that it had been retained by the Plaintiff.

No steps were taken to bring those proceedings on for hearing and a perusal of the District Court file shows that there was no attempt by the Plaintiff to comply with an order for discovery which is dated 8th December, 1983, but whether it was ever served or not I do not know as there is no affidavit of service on the file. However, with those proceedings still in existence and the Plaintiff having elected to bring his proceedings in the District Court, he suddenly had a change of mind and on 6th March, 1984 he issued the bill writ in the High Court at Whangarei claiming the sum of $1,333.35 and only as against the person who signed the cheque. On 14th March, 1984 that bill writ was served and on 27th March, 1984 the present motion was filed seeking leave to defend, one of the grounds being that the High Court was in the circumstances without jurisdiction.

The Defendant filed an affidavit which in effect brought to the attention of this Court the proceedings which had been issued in the District Court and attached to the affidavit were copies of those proceedings. No affidavit in opposition was filed by the Plaintiff. However, on the 19th March, 1984, and that is after the bill writ had been served, the Plaintiff filed in the District Court a notice of discontinuance in respect of the proceedings in that Court. Pursuant to Rule 132(3) of the District Court Rules 1943 that discontinuance could not be entered until the expiration of three days from the date of service of the notice of discontinuance. Had the Defendant been like minded he could also have issued a bill writ for the amount of the cheque which had been handed to him by the Plaintiff, but to his credit he chose not to do so and he still maintained that the

appropriate place for the hearing of any dispute between the parties was at the District Court rather than this Court.

Thus as at the date when the discontinuance was filed in the District Court there were two sets of proceedings in existence between the same parties and in respect of the same amount, both actions being based on the transaction which occurred on the 8th September, 1983 when the Defendant purchased or acquired the camera equipment.

Counsel for the Plaintiff drew attention to Rule 243 of the Code of Civil Procedure and claimed that he could call in aid that Rule and submitted that the Plaintiff, now having elected to proceed in the High Court, it was entitled to continue with the present proceedings. It was further contended on behalf of the Plaintiff that the affidavit filed did not disclose a good defence.

To my mind both of those submissions are really without foundation in the circumstances of this case. Rule 243 relates to the position which arises where two actions are brought by the same Plaintiff grounded on or arising out of the same subject matter but seeking different forms of relief, but in a position where the Plaintiff cannot have both forms of relief. In that set of circumstances the Court can require the Plaintiff to elect which of the actions he will proceed with and in the meantime proceedings are to be stayed. But that rule is not available, in my view, to the present situation where one set of proceedings is in the High Court and another set is in the District Court.

The decision in Shannon v. Kia Ora Fish Market (1950) N.Z.L.R. 396 makes it plain that Rule 243 of the Code of Civil Procedure relates to two actions in the High Court (Supreme Court) arising from the same subject matter. That particular case was concerned with two separate sets of proceedings, one in the then Supreme Court and one in the Compensation Court where the latter had an independent jurisdiction which was not subject to control or interference by the Supreme Court. By the same token I am of the view that having regard to the way these two sets of proceedings were issued, Rule 243 which controls practice in the High Court cannot be invoked to deal with the situation which arose between these parties.

So far as the application for leave to defend the bill writ is concerned, where affidavits are filed disclosing a good defence then the Court has power to grant leave to defend subject to such terms as it thinks fit, whether as to security or otherwise. In that case decisions such as L. D. Nathan & Co. Ltd v. Vista Travel Ltd (1973)1 N.Z.L.R. 233 and Finch Motors Ltd v. Quin (1980)2 N.Z.L.R. 513 could have been of application. But in the instant case Mr Hislop relies on the remaining provisions of Rule 495 in support of his application and in particular sought the orders he asked for in relation to the application for leave to defend relying on the words in the Rule: "...such other facts as the Judge may deem sufficient to support the application". However, he contended with some considerable force that having regard to what had occurred the appropriate course for the Court to take was to dismiss the bill writ on the basis that the

issue of it was in all the circumstances vexatious.

In Shannon v. Kia Ora Fish Market Ltd (supra), Stanton, J. at page 397, after deciding that Rule 243 could not be applied, went on to say as follows:

> "It is said, however, that this Court has inherent jurisdiction to avoid multiplicity of suits by restraining litigants who bring actions on the same matter in different Courts, or even in this country and foreign countries. This seems to be the view of Courts in England, and in McHenry v. Lewis (1882)22 Ch.D. 397 the Court of Appeal held that the High Court had power to interfere in such a case under its general jurisdiction to restrain vexatious and oppressive litigation. Presumably the remedy would be applied indirectly in such a case as the present, the plaintiff being restrained from proceeding with his action in this Court until the action in the Compensation Court was heard or withdrawn.
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> "The case quoted shows that the jurisdiction is discretionary, and will not be exercised in favour of a defendant unless the litigation is clearly vexatious and unnecessary."

To my mind the present set of proceedings can be labelled as being clearly vexatious and unnecessary. The Plaintiff chose his original forum as being the District Court and he must have known full well that it was likely in the circumstances that a defence would be filed and a set off pleaded. When that happened he allowed the proceedings to remain for some time when, with apparent disenchantment with what had occurred, he decided while those proceedings were still in existence to resort to the bill writ procedure. This was a procedure which had been available to him right from the beginning and he elected not to avail himself of it. However, having in March 1984 elected to resort to the bill writ procedure, he did not firstly discontinue the proceedings in the

District Court but maintained them until after the bill writ was served and after having ensured that the writ had been so served he then discontinued so as, in effect, to render the Defendant's set off somewhat nugatory.

To my mind the Plaintiff deliberately chose to try and seek an advantage to which, in my view, in all the circumstances he was not entitled. To issue the bill writ was in my view, in the words of the Shannon case, "clearly vexatious and unnecessary".

In all the circumstances I am of the view that this is one of the rare type of cases where the Court should intervene and show its disapproval of such conduct by striking out the bill writ as being a proceeding which ought not to have ever been issued. Accordingly there will be an order striking out the bill writ and the Defendant is entitled to costs which I fix at $100 plus any disbursements.

For the amount involved, and having regard to what has occurred, I am of the view that the proper forum now is the District Court and if the matter is to be litigated then that is the forum where it should be.

During the course of argument counsel for the Plaintiff referred to certain facts of which I could take no cognisance as there was no affidavit before me as to them. However, Mr Hislop did not demur in respect of the facts as put forward by Mr Reeves and if the situation was as outlined then I simply comment that it is about time these two parties decided to resolve their differences in a reasonable and sensible manner instead of trying to

secure technical advantages.

It must be remembered that the Defendant likewise had available to him the bill writ procedure, but he elected to meet the Plaintiff's challenge by filing his set off in the District Court.

P.D. Inj.

SOLICITORS:

Thorne Dallas Perkinson & McGregor, Whangarei for Defendant

Hughes Henderson & Reeves, Whangarei for Plaintiff