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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.623/94

LOW PRIORITY

BETWEEN IAN CAIRNS HUTT AND ROSA PATRICIA HUTT

Plaintiffs

AND AVERY WALLACE LTD

First Defendant

AND VICTOR VOLKOFF also known as VIKTOR VLADIMIROVICH VOLKOV

Second Defendant

AND RANUI DEVELOPMENTS LTD

Third Defendant

Hearing: 18 September 1996

Counsel: *Craig McCullough* for Plaintiffs
Matthew Koppens for First Defendant

Judgment: 18 September 1996

ORAL JUDGMENT OF TOMPKINS J

Solicitors:
Swayne McDonald and Co, Auckland for Plaintiffs
Wynyard Wood, Auckland for First Defendant

The plaintiffs have moved for a nonsuit. Mr Koppens for the first defendant has submitted that it is now too late for an order of nonsuit to be made.

This action concerns money made available by the plaintiffs to facilitate the manufacture of jewellery by the first defendant for shipment to Russia by the second defendant or the second defendant's company, the third defendant. The hearing commenced on Monday 16 September 1996. Evidence was called by and on behalf of the plaintiffs, and by Mr Avery on behalf of the first defendant. At the conclusion of the evidence I heard submissions from Mr McCullough for the plaintiffs and Mr Koppens for the first defendant. That concluded at 5 pm yesterday afternoon. I then stated that I would deliver an oral judgment at 3.45 pm this afternoon.

The court resumed at that time. Looking at the material I had with me on the bench I said, "This will be an oral judgment". At that stage Mr McCullough said to the court that he had just received instructions from the plaintiffs that they elected a nonsuit. It was under those circumstances that Mr Koppens submitted that it was too late, that the application for nonsuit should be declined and the court should proceed to deliver its judgment.

Rule 489 provides:

> "489. **Nonsuit** - The plaintiff in any proceeding may, at any time before a verdict or judgment has been given, elect to be nonsuited; and the Court may nonsuit a plaintiff without his consent."

The learned author of *McGechan on Procedure* states that the plaintiff's power to elect is absolute. The plaintiff may exercise it without the consent of the opposite party and without the leave of the court. The issue that confronts me now is whether the plaintiff elected to be nonsuited at "any time before a ... judgment has been given".

I have considered the decision of Fair J in *Foley and Anor v Bank of New Zealand*[1]. Following a hearing in which evidence had been called by the plaintiffs and the defendant and after the Judge had delivered an oral judgment in which he said that there must be judgment for the defendant, counsel for the plaintiffs asked that in lieu of entering a formal judgment a judgment of nonsuit

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1 (1953) NZLR 303.

should be entered to enable the plaintiffs to bring another action against the bank. Fair J declined to do so. He held that the proper course was for the court to adhere to its original pronouncement and direct that judgment be entered for the defendant.

I have also considered the judgment of Fisher J in *Tranzequity Holdings v Malley*[2]. That action had proceeded on a counter claim. Following submissions from his counsel, the defendant and one witness gave evidence. The defendant closed his case. Counsel for the plaintiff submitted there was no case to answer. The Judge invited counsel for the defendant to respond. In the course of those submissions Fisher J in his judgment said that it was fair to say that it had become apparent to all concerned that there was really no answer to the submission made by counsel for the plaintiff that the plaintiff had no case to answer. At the conclusion of the submissions by counsel for the plaintiff Fisher J had got so far as to say, "I will now give judgment". At that point counsel for the defendant arose and said he elected to be nonsuited. Fisher J concluded that a nonsuit election was too late. He considered it was a border line case but his decision to give judgment at the point that he did in the context of the exchange between counsel and the bench which preceded it must have made it inevitable that judgment was about to be given for the plaintiff. This was apparent not only because of the discussion during submissions, but also because the statement that judgment was going to be given could only be an indication that judgment would be given against the defendant.

That is not the position in the present case. Mr Koppens submitted that in the course of Mr McCullough's submissions yesterday, it was apparent from the inter change between Bench and Bar that I considered that the plaintiffs had real difficulties with at least some of the causes of action. It is correct that, as is commonly my practice, I was closely questioning Mr McCullough on some of the issues, and in the course of doing so I may have given an impression on how some of those issues may be resolved. But, as Mr McCullough has reminded me, when I was doing that I expressly stated that I was "testing" the contentions that he was advancing. I do not consider that that process of testing ought to have given any firm and clear indication of what my judgment was going to be. This is reinforced by the fact that I adjourned for almost a day before I intended to deliver an oral judgment. Further, although the hearing was relatively brief, the factual

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2 (1990) 3 PRNZ 117.

situation was quite complicated, with a considerable number of documents to be considered as well as the oral evidence.

In these circumstances I am satisfied that the plaintiffs did elect to be nonsuited at a time before judgment had been given. They, therefore, have the right to do so. I accordingly declare a nonsuit.

The first defendant is entitled to costs according to scale. I grant a certificate for the whole of the costs in accordance with clause 36 of the second schedule of the High Court Rules. It is also entitled to disbursements and witnesses' expenses to be fixed by the registrar. Mr Koppens submitted that the defendant should be entitled to solicitor and client costs. While there may be some circumstances where the grant of solicitor and client costs is justified on a nonsuit, I do not consider that to be so in this case.