EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT WAITAKERE

CIV-2015-090-000531
[2016] NZDC 11731

BETWEEN	CORNWALL CONTRACTORS LIMITED Plaintiff
AND	DESMOND KAN Defendant

Hearing: 23 June 2016

Appearances: D J Clark and S Fletcher for the Plaintiff
P Hunter for the Defendant

Judgment: 15 July 2016

RESERVED DECISION OF JUDGE P A CUNNINGHAM

Introduction

[1] This case is about unpaid accountancy fees said to be owing to the plaintiff by the defendant.

[2] The proceeding was filed in May 2015. On 23 September 2015 Mr Kan entered into a settlement agreement with the plaintiff on the morning of a hearing of the plaintiff's summary judgment application.

[3] The issue that has now arisen is whether that settlement agreement has compromised the plaintiff's claim and if not whether the defendant can now be allowed to defend the original claim.

Background

[4] Before turning to the respective parties' arguments it might be helpful to lay out some of the background. Mr Foley who is the sole director of the plaintiff and the person who did the accountancy work and Mr Kan know one another because they are both members of the Committee of the Royal New Zealand Navy Pistol Club.

[5] Mr Kan is real estate agent. As at November 2011 he was carrying out administration services for 22 bodies corporate. Mr Kan asked Mr Foley if he would help him resolve some financial issues with the accounts for some of these bodies corporate that he managed.

[6] Mr Foley's position is that the cost of the work he was to carry out was not discussed. He undertook work over a two-year period and his time records show that he spent 1612 hours doing the work up to 18 November 2013. At an hourly rate of $69.00 including GST that resulted in the sum of $111, 228.00 inclusive of GST being owed to the plaintiff. He said that it was agreed as between him and Mr Kan that the work would be billed when it was close to completion.

[7] He raised the subject of payment in an email to Mr Kan on 18 November 2013. When Mr Kan did not reply he sent another email on 25 November 2013. In these emails Mr Foley proposed that he would make a one-off discount of 20% and spread the payments over a twelve month period beginning in January 2014.

[8] On 25 November 2013 Mr Kan replied. His email read as follows:

> Thanks Steve.
>
> I am still getting up off the floor over your account.
>
> And I had shearing for the past 5 days and the IRD, so trying to get them satisfied first.
>
> Then we can sort out what is to be done.

[9] A month later on 25 December Mr Kan wrote to Mr Foley saying that they would get together in January to discuss and sort out a way forward.

[10] Nothing happened until the end of April 2014. Mr Foley wrote to Mr Kan saying that he had been unable to invoice the work up until that point due to unforeseen family issues. He subsequently did so. He rendered invoices from April 2014 to March 2015 in the amount of $9,269.00 per month plus GST a total of $111,228.00.

[11] In an email dated 7 May 2014 Mr Kan said the following:

> …I can remember distinctly discussing that you're your fees were to be half of the admin fees and any accounting fees that were built in.
>
> Whatever you will be paid, but as soon as the farm is sold whenever.
>
> …

[12] On 18 March 2015 Mr Foley emailed Mr Kan saying that he had heard that he had sold his farm and was disappointed that he had not been told about that and asked when he would be paid his outstanding fees. He also said that he was looking at debt recovery options.

[13] Mr Kan replied on 2 July and he said:

> Right at the moment there are no funds to be able to meet your invoices.
>
> As previously stated, once the farm is sold I will be able to honour your debts. Hopefully it will not take too long. If you decide to go down the hard path then no one will win.

[14] Mr Foley replied saying that he would hold off any legal or debt collection processes for the time being.

[15] Mr Foley eventually instructed solicitors to act for him, a letter before litigation dated 8 May 2015 was sent and these proceedings followed.

The Court proceedings

[16] The plaintiff filed this proceeding including an application for summary judgment on 21 May 2015.

[17] The first call of the summary judgment application was 29 July 2015. The day before Mr Kan filed a document entitled "notice by debtor of intention to oppose application."

[18] At the next call date of 23 September 2013 Mr Kan appeared in person and the settlement agreement was drawn up and signed by both parties.

[19] The document which set out a payment regime by Mr Kan of the amount sought in the claim, namely $118,004.11.

[20] That document provided for an initial payment of $20,000.00 on 23 October 2015 and that payment was made. Thereafter there were to be monthly payments of $3,636.36 with the first due on 23 November 2015. This payment was made on 25 November 2015. As at the date of hearing before me which was 23 June 2015 Mr Kan was up to date with ongoing his monthly payments.

[21] At the end of that eleven month period there would be a balance of $58,004.11 owing which was to be paid no later than 23 October 2018. Interest at the rate of 5% per annum was to accrue on that sum until paid.

[22] Clause 4 of the document said:

> The trustees of the Horseshoe Bush Trust shall provide security by way of a registered Auckland District Law Society mortgage for the balance of the debt ($58,004.11 plus interest) over the property at 77 Alf Access Road, RD 2, Henderson and any default on the payment of the debt by me shall entitle the plaintiff to enforce all rights under the mortgage and this deed. The trustees, other than Desmond Kan, shall have their liability limited to the assets of the trust.

[23] The problem that arose is that the mortgage to be provided as security for the balance of the debt has not been forthcoming.

[24] Paragraph 5 of the document signed by Mr Kan said:

> In consideration of the above the plaintiff will adjourn the proceedings to a date after 23 October 2015, and assuming the first instalment of $20,000.00 has been paid and the mortgage has been registered, the plaintiff will discontinue these proceedings.

[25] The next hearing date was 18 November 2015. Two days before Mr Kan sought legal advice. Mr Hunt appeared for Mr Kan on 18 November and Ms Fletcher for Cornwall Contractors.

[26] A minute of Judge Bergseng from the hearing of 18 November 2015 (the minute dated 26 November 2015) recorded that difficulties had arisen around the implementation of the settlement agreement. That the plaintiff wanted to proceed to obtain summary judgment. Mr Kan wanted leave to file a notice of opposition and affidavit in answer.

[27] Paragraph [5] of the Judge's minute said as follows:

> So that the matter can be fully argued, I make the following directions:
>
> (a) the defendant is to file within 14 days a written application pursuant to rule 12.9(3) for leave to be leave to be heard in opposition to the plaintiff's application. Any affidavit(s) in support to be filed and served at the same;
>
> (b) The plaintiff is to file and serve any notice of opposition and affidavit evidence in support of its opposition within 14 days of service.

[28] In documents dated 10 December 2015 and filed in the Auckland District Court on 11 December 2015 Mr Kan filed an application for leave to file a notice of opposition and affidavit in opposition to the plaintiff's application for summary judgment out of time and an affidavit in support.

[29] On 6 January the plaintiff filed in opposition to the application an affidavit of William Foley in support of that notice of opposition sworn on 23 December 2015.

Mr Kan has filed a reply affidavit to those documents and an affidavit sworn on 4 February 2016 and filed with the Court on 5 February 2016.

The hearing before me

[30] The application for leave to oppose the plaintiff's application for summary judgment by filing a notice of opposition and an affidavit in opposition proceeded. If the application is declined than the plaintiff asked for judgment on its proceeding and the summary judgment application in particular.

The applicant's submissions

[31] Mr Hunt submitted that in an application for leave there were considerations. Those were:

(a) whether a substantial defence exists;

(b) is the delay is reasonably explained;

(c) whether the plaintiff would suffer irreparable injury.

These are the same principles applied in deciding whether to set aside a judgment. This was approved in *Chappel Carriers Ltd v Chappel Properties Ltd*[1] Subsequent cases have approved the test.

[32] The defence to be advanced is twofold:

(a) that the plaintiff's claim has been compromised by the agreement dated 23 September 2015 signed by Mr Kan and the plaintiff can no longer proceed with the cause of action in the statement of claim;

(b) if the plaintiff can revert to its original claim, Mr Kan has a substantial defence, namely that he does not agree that the fees charged were on the basis agreed as between the parties.

[1] (1997) 11 PRNZ 366.

[33] Dealing with each in turn. The first is that the original claim has been compromised. Reference was made to *Osbourn v McDermott*[2] where Phillips JA referred to different types of agreements that might be described as a compromise. His Honour said that there were three possibilities:

> … First, there is the mere accord executory which, on the authorities, does not constitute a contract and which is altogether unenforceable, giving rise to no new rights and obligations pending performance and under which, when there is performance (but only when there is performance), the plaintiff's existing cause of action is discharged. Secondly, at the other end of the scale is the accord and satisfaction, under which there is an immediate and enforceable agreement once the compromise is agreed upon, the parties agreeing that the plaintiff takes in satisfaction of his existing claim against the defendant the new promise by the defendant in substitution for any existing obligation. Somewhere between the two, there is the accord and conditional satisfaction, which exists where the compromise amounts to an existing and enforceable agreement between the parties for performance according to its tenor but which does not operate to discharge any existing cause of action unless and until there has been performance.

[34] For Mr Kan it was argued that is the second possibility and that the underlying claim had been extinguished. Apart from the two day late payment in November Mr Kan had complied with the settlement agreement.

[35] In relation to the mortgage to be granted by Horseshoe Bush Trust, Mr Hunt submitted that Mr Kan was not in a position to agree to this and that the trustees are not a party to the settlement agreement. Because Mr Kan has been unable to obtain the agreement of the other trustees the clause is a nullity.

[36] Mr Hunt went on to say that the proper course for the plaintiff is to cancel the settlement agreement which would give a right of challenge to Mr Kan before proceeding on the original claim.

[37] Secondly Mr Kan stands by his position that there was an agreement that Mr Foley's fee would be half of the administration fees payable to him in a 24 month period. In an affidavit in support Mr Kan has said that the amount being claimed by Mr Foley is equivalent to fees able to be earned by him from the management of the bodies corporate over a five year period or more. This is the substantial defence to the claim.

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[2] [1998] 3 VR 1 (CA).

[38] Next it was argued that the delay has been reasonably explained including that Mr Kan was not legally represented until 16 November 2015. After entering into the settlement agreement on 23 September 2015 Mr Kan considered the matter was settled.

[39] Finally, it was submitted that there will be no harm to the plaintiff as payments are being made by Mr Kan.

The plaintiff/respondent's submissions

[40] Mr Clark did not disagree with the legal principles to be applied to Mr Kan's application for leave to file a notice of opposition and affidavit in support in relation to the summary judgment application.

[41] Mr Clark submitted that by signing the deed which included the words:

> I will admit to the debt claimed by the plaintiff as outlined in this memorandum in the sum of $118,004.11. This is in consideration the plaintiff will forbearing to enter judgment against me.

That this amounted to an admission of liability and therefore Mr Kan cannot now oppose the plaintiff's claim.

[42] Mr Clark submitted that the provision of security for the balance was an integral part of the compromise agreement which had not been honoured. This meant that the agreement was of no effect notwithstanding that Mr Kan was making the payments. This is because of the wording of clause 5 in particular which read:

> In consideration of the above the plaintiff will adjourn the proceedings to a date after 3 October 2015, and assuming the first instalment of $20,000.00 has been paid and the mortgage has been registered, the plaintiff will discontinue these proceedings.

[43] In terms of the substantial ground for a defence, namely, an agreement that Mr Foley would limit his fees to half of Mr Kan's income for management of the bodies corporate, this was described as a mere assertion and not an arguable defence. Reference was made to a decision of Duffy J in *ANZ National*

Bank Ltd v Morgenstern[3] where Her Honour said that the evidence failed to satisfy the Court that the defendant had a substantial and credible defence to the claim. The evidence was described as a simple assertion which were insufficient to raise an arguable defence particularly as they were inconsistent with proved documents and lacked credibility.

[44] In terms of delay, Mr Clark submitted that it was only when the security could not be provided that Mr Kan advanced a defence.

[45] Mr Clark accepted the plaintiff would not suffer irreparable harm.

Assessment

Is there a substantial defence?

[46] In terms of whether the claim is compromised by the agreement, it was argued that Cornwall relied on and required the security to be given. While it is true that the trustees of the Horseshoe Bush Trust were not present and not parties to the agreement, there is a clear inference that Mr Kan (who is one of three trustees) would have given some assurance that the security would be forthcoming. As Mr Clark put it, to say otherwise would be equivalent to a person who gives his word and then defaults on it using that default as a shield. There is considerable merit to this argument. But I do not intend to rule on this issue now for reasons which follow.

[47] If the claim is not compromised by the agreement dated 23 September 2015, the issue for consideration is whether Mr Kan as an arguable defence.

[48] I refer to the decision of Associate Judge Doherty (as he then was) in *Strategic Finance Ltd v Henderson*[4] where the test to be applied as to what a substantial ground of defence means. His Honour said this at paragraph [37]:

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[3] Auckland High Court CIV-2009-404-000807 2 July 2009.
[4] Christchurch High Court CIV-2009-409-001731 11 June 2010.

> [37] The argument may be one of semantics, but in my view something less than the summary judgment threshold of a reasonably arguable defence is the threshold. I think something akin to a prima facie case is the appropriate standard: or put another way, is there sufficient evidence to show there is a reasonable possibility of the defence succeeding?

[49] I do not see this as a case of mere assertion of the type that was discussed in the *ANZ National Bank* case. That case was about a guarantee and there was written evidence of the guarantees. In that type of case it is difficult to rely on oral evidence to contradict written documents. That is not the position in this case.

[50] In my view, this situation is somewhat unusual. Work carried out over a two-year period was not billed until April 2014. Almost six months earlier Mr Foley had told Mr Kan the value of the work that he had carried out and what he proposed to charge for the work. It is apparent from Mr Kan's email of 25 November 2013 that he was stunned when he was told what the account was going to be.

[51] While he did not say that there was prior agreement around Mr Foley's fee until some months later, what he says about that is worthy of consideration in my view. If the work was not going to be billed for two years, one would expect that the person commissioning the services would want some idea of what the cost was going to be. That is consistent with Mr Kan's evidence that there was an agreement it was going to be 50% of what he received by way of payment from the bodies corporate he was managing.

[52] It will be a matter of evidence as to whether the statement by Mr Kan in the document dated 23 September 2015 is an admission of liability. It seems to me that that can only be resolved by viva voce evidence which means that the matter is unlikely to be suitable for summary judgment.

[53] I am satisfied that there is sufficient evidence from Mr Kan to show there is a reasonable possibility of his defences succeeding.

Delay

[54] I turn to the issue of delay. It is apparent from the correspondence that Mr Kan had other things on his mind apart from this issue back in 2014. He made reference to shearing, a difficulty with the IRD and then selling the farm. It is clear that he was struggling financially from the correspondence between him and Mr Foley prior to the issuing of proceedings. Which could well explain his reluctance to instruct the solicitors to act for him. He also appears to have had a number of issues he was dealing with.

[55] He did file a document intending to inform the Court that he wished to defend the summary judgment application, that is the document dated 28 July 2015. He was not legally advised until 16 November 2015.

[56] On balance I am satisfied that there are reasons for the delay.

[57] There is no issue there will be irreparable harm to the plaintiff, particularly if Mr Kan continues to make payments as per the settlement agreement dated 23 September 2015.

Result

[58] Leave is granted to Mr Kan to file a notice of opposition and an affidavit in opposition to the summary judgment application. Those documents must be filed and served by 8 August 2016.

[59] The plaintiff is entitled to file material strictly in reply by 22 August 2016.

[60] I ask the Registrar to set this matter down for a telephone conference with counsel on the first available date after 29 August 2016 so that the parties can advise the Court how they wish to proceed from that point. The parties are to file memoranda three clear days before the date of the conference.

Costs

[61] Although Mr Kan has been successful, he is seeking leave of the Court to file documents out of time. I suggest that costs should be reserved. However I reserve leave for the parties to file memoranda in relation to costs within 21 days if they are not content with any suggestion. I will decide any issue as to costs on the papers.

Dated at Auckland this day of July 2016 at am/pm.

P A Cunningham
District Court Judge