

**IN THE DISTRICT COURT
AT TAIHAPE**

**CIV-2017-067-000016
[2017] NZDC 22354**

BETWEEN	ANDREW NICHOLAS HOLDGATE T/A JR CONSTRUCTION Plaintiff
AND	CJ AUTOMOTIVE LIMITED First Defendant
AND	CHRISTOPHER JOSEPH MAHER Second Defendant

Hearing: 28 September 2017
(Heard at Hamilton)

Appearances: A Woodhouse for the Plaintiff
K Bond and Hill for the First and Second Defendants

Judgment: 9 October 2017 at 11.00 am

**RESERVED JUDGMENT OF JUDGE D WILSON QC
[Application for Summary Judgment]**

[1] This is an application for summary judgment by the plaintiff. In the application the plaintiff seeks orders that he be given immediate possession of seven vehicles, which have been at the premises of the second defendant for varying periods of time and they still remain there.

[2] The first defendant has claimed a right of lien over the vehicles. The basis upon which the lien has been claimed is the subject matter of the principal dispute between the parties.

[3] Put shortly, the plaintiff claims that the defendants:

- (a) Have no right to a lien over any of the vehicles which were at the first defendant's premises;
- (b) That the Terms and Conditions of trade gave no right to such claim for lien;
- (c) That no lien in any event could apply in regard to alleged storage fees for which no invoice had been issued at the time when the lien was claimed.

[4] It is a critical issue of fact in the determination of this case whether or not, as the second defendant says, he told Mr Holdgate that storage would be charged, or as Mr Holdgate says that there was no such understanding or arrangement.

[5] Indeed, plaintiff's counsel in his written submissions¹ expressly acknowledged that "There are key disputes of fact, including whether the plaintiff was made aware of and agreed to the first defendant's terms and conditions"

Legal principles

[6] Rule 12.2 of the District Court Rules 2014 provides :

Judgment when there is no defence or when no cause of action can succeed

- (1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to any cause of action in the statement of claim or to a particular cause of action.

[7] Elias CJ in *Westpac Banking Corporation v MM Kembla New Zealand Limited*² set out the general approach to be adopted in summary judgment applications. Although that case involved an application by a defendant for summary judgment which, as Elias CJ pointed out, is not directly equivalent to a plaintiff's application, the following passage is equally applicable to either type:³

¹ At para [3.2].

² *Westpac Banking Corporation v MM Kembla New Zealand Limited* [2001] 2 NZLR 298 (CA).

³ At [62].

Application for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the Court and cannot confidently be concluded from affidavits. It may also be inappropriate where ultimate determination turns on a judgment only able to be properly arrived at after a full hearing of the evidence. Summary judgment is suitable for cases where abbreviated procedure and affidavit evidence will sufficiently expose the facts and the legal issues. Although a legal point may be as well decided on summary judgment application as at trial if sufficiently clear (*Pemberton v Chappell*) [1987] 1 NZLR 1), novel or developing points of law may require the context provided by trial to provide the Court with sufficient perspective.

[8] In *Pemberton v Chappell*⁴ Somers J said at p3:

... In this context the words “no defence” have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example, no bona fide defence, no reasonable ground of defence, no fairly arguable defence.....On this the plaintiff is to satisfy the Court; he has the persuasive burden. Satisfaction here indicates that the Court is confident, sure, convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty.

[9] Summary judgment proceedings are designed for cases where there is clearly no defence. Defendants should not be deprived of their right to trial unless the plaintiff clearly demonstrates that there is no reasonable possibility of the defence succeeding. The following passage from Tipping J in *Lindale Financial Services Ltd v Colonial Mutual Life Assurance Society Ltd*⁵ demonstrates the balance required in assessing a summary judgment application:

Summary judgment proceedings are designed for cases where it is clear there is no defence to the plaintiff’s claim. While it is entirely proper for the Court to take a robust approach when ascertaining whether the proffered defences have any arguable validity or are simply a smokescreen, there are limits. Defendants should not be deprived of the opportunity of a full trial, unless the plaintiff clearly demonstrates that there is no reasonable possibility of the defence succeeding. While summary judgment proceedings are a valuable and desirable short cut in clear cases, care must be taken not to allow excessive robustness to work an injustice to the defendant.

[10] Where the defence raises questions of fact upon which the outcome of the case might turn, it will not be appropriate to enter summary judgment unless the Court can

⁴ *Pemberton v Chappell* [1987] 1 NZLR 1.

⁵ *Lindale Financial Services Ltd v Colonial Mutual Life Assurance Society Ltd* (1997) 12 PRNZ 320 at page 322.

be satisfied that the defendant's statements as to matters of fact are baseless: *AG v Rakiura Holdings Ltd.*⁶

[11] The defendant must particularise the defence relied upon. Vague and fanciful allegations in an affidavit in opposition will not suffice. There is need, therefore, to scrutinise the affidavits to see if they pass the threshold of credibility.

[12] On an issue of credibility, summary judgment will not generally be a useful vehicle since conflicts of evidence and the plausibility of evidence should be resolved at trial.

[13] Where, however, statements in an affidavit are equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or are inherently improbable, such statements may be looked at critically.

[14] Where the affidavit evidence is unsatisfactory or inconsistent summary judgment may be inappropriate: *Auckett v Falvey*⁷.

Discussion

[15] The legal question of whether the Terms and Conditions of trade (assuming, as the plaintiff suggested, that they applied to the dealings between the parties) included the right to exercise a lien for storage fees turns on those discussions between the principal parties. Indeed the submissions of plaintiff's counsel acknowledge the dispute in this area, and that such factual disputes:

Cannot usually be resolved in the determination of a summary judgment application, those disputes being:

- (a) Whether the terms of trade displayed on CJ Automotive Ltd's wall apply at all (in other words whether they were brought to Mr Holdgate's attention); and
- (b) Whether the defendants had any entitlement to storage charges for the vehicles and/or whether they exercised that right (given that the terms of trade indicate that storage fees "may" be imposed).

⁶ *AG v Rakiura Holdings Ltd* (1986) 1 PRNZ 12.

⁷ *Auckett v Falvey* (High Court, Wellington; CP 296/86; 20 August 1996).

[16] Plaintiff's counsel therefore proceeded on the basis that the defendants' submissions on the issue of whether the Terms and Conditions of trade were incorporated into the arrangements between the parties, but even that concession does not overcome the essential factual dispute.

[17] I do not accept Mr Woodhouse's invitation to put the defendant's affidavits to one side on the basis that it was patent that the invoices for alleged storage fees only arose after Mr Holdgate had gone to the police complaining that his vehicles had been converted. Mr Woodhouse submitted that this showed that the invoices were made up and were never genuine. That is an issue of plausibility and /or credibility which can only be determined on oral evidence.

[18] It is not a finding of fact that I can reach on the disputed facts in this case. The dispute is as to relevant and genuine matters. This is not a case where the defendants have simply made broad allegations suggestive of disputed facts. Here the second defendant has made specific factual claims – he deposed that he drew the plaintiff's attention to the Terms and Conditions, that they discussed them on numerous occasions, that he raised the issue of storage fees more than once and that in any event, the amount of the storage fees and the earliest date from which they might be imposed was clearly stated in the Terms and Conditions of trade.

[19] In this case the contract between the parties is in partly written and partly oral form. There are significant disputes as to the oral discussions between the parties and as to the proper interpretation of the Terms and Conditions of trade.

[20] It may well be that such enquiries would be assisted by evidence of the general practice in the area in which the defendants conducted their business. Mr Woodhouse submits that the first defendant's business includes not only mechanical repairs but also towage and storage arrangements and:

- (a) That in most circumstances a lien could arise in relation to storage charge;

- (b) That the Terms and Conditions of trade reserved for the defendants the right to hold vehicle until full payment of invoices being fulfilled and a daily storage fee of \$12 plus GST “may be imposed”.

[21] Accordingly, determining whether or not there was advice that those storage fees would be imposed and for what reason is a central factual issue in the case.

[22] Mr Bond submitted:⁸

The defendant has made specific factual claims that he drew the plaintiff’s attention to the Terms and Conditions and that they discussed it on numerous occasions,⁹ which have been disputed by the plaintiff. This is a genuine factual dispute on a key issue (if not the key issue) in this dispute. It is submitted that it simply cannot be resolved on the affidavit evidence and requires a full hearing so that the credibility of the witnesses can be properly assessed.

[23] I agree.

[24] The plaintiff has failed to satisfy me that the defendant has no defence to any cause of action in the statement of claim.

[25] The application for summary judgment is accordingly refused.

Costs and disposal

[26] If counsel are unable to agree on costs, or they submit that the costs issue should be left for determination with the substantive hearing which must now follow, then they should file memoranda accordingly.

[27] I direct that the file be returned to Taihape District Court from which it issued.

[28] I invite the registrar at Taihape to contact counsel to arrange a telephone conference for counsel so that a Judge can give such directions as the Judge sees fit.

⁸ Submissions para [38].

⁹ Mr Maher Affidavit sworn 12 July 2017, BD page 41 at [4], [7] and [9].

D Wilson QC
District Court Judge