HONG KONG / JUDGMENT

# HANDY CONTRACTOR CO LTD v. FOO SIANG KIEW

COURT
District Court

DECIDED
6 July 2007

CASE / FILE NUMBER
DCCJ4449/2006

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bjbj &{ey His Honour Judge Stanley Chan in Chambers (Open to Public) Date of Hearing: 25th May 2007 Date of Handing Down Decision: 6th July 2007 DECISION This is an inter-partes application made by the Defendant for an Order :- that the Judgment entered in default of defence on 24 February 2007 ( Default Judgment ) be set aside under Order 13 Rule 9 of the Rules of District Court; and that the Statement of Claim of the Action be struck out under Order 18 Rule 19.

## Background

The Plaintiff is and was at the material time a construction company incorporated in Hong Kong. The Defendant is and was a sole proprietor operating a business called Kin Ko Construction & Engineering Company ( Kin Ko ). It was claimed that between February 2002 and June 2002, the Plaintiff made 3 loans to the Defendant in the total sum of $110,000. The loans were made on 7 February 2002, 28 March 2002 and 22 June 2002 respectively. The loans were repayable on demand. Upon demand, the Defendant failed and/or refused to repay the loans. A letter of demand dated 30 August 2006 was sent by the Plaintiff s solicitors to the Defendant. Subsequently, a Writ of Summons was issued by the Plaintiff to the Defendant under Action No. DCCJ 4449 of 2006 (Action 4449) on 8 September 2006. At this juncture, it is of importance to note that on 27 July 2006, roughly one month before the letter of demand was issued by the Plaintiff, the Defendant under the name of Kin Ko, commenced the legal proceedings against the Plaintiff under Action DCCJ 3695 of 2006 (Action 3695) to claim the balance of the price in the total sum of $598,965.50 for the work done and services rendered under the contract signed between Kin Ko and the Plaintiff on 12 February 2001. The claim by the Plaintiff for the sum of $110,000 was pleaded by the Defendant at para.6 of the Amended Statement of Claim for Action 3695 dated 29 September 2006 (p.46 of the bundle). The Plaintiff pleaded the said sum of $110,000 as loans to the Defendant at para.8 of the Amended Defence and Counterclaim for Action 3695 dated 12 October 2006. At the request of the Defendant, both parties agreed to consolidate the two proceedings, viz Action 3695 and Action 4449. A Consent Summons to consolidate the two Actions was signed by the parties which was filed in court on 11 October 2006 in which it was agreed that

Action 3695 would be the leading Action. However, as the format of the said Consent Summons was not accepted by the Master of the District Court, the parties continued to negotiate as to the format of the said Consent Summons. In the letter issued by the Defendant s solicitors, Messrs Wong Poon Chan Law & Co., to the Plaintiff s solicitors, Messrs Tsang & Wong, dated 23 October 2006, it was said: In view of the recent amendments made by both parties to their respective pleadings in DCCJ No.3695/2006, it is apparent that your client s action of DCCJ No.4449/2006 is not necessary to maintain. In order to save time and costs, we suggest your action DCCJ No.4449 of 2006 be withdrawn with no order as to costs. The Consent Summons relating to Action 4449 was drafted in the following terms: by consent that the above-mentioned action be consolidated with DCCJ3695 of 2006 and thereafter be carried on as one action and that the leading action be DCCJ 3695 of 2006 The title of Action 3695 was redrafted as between Kin Ko Construction & Engineering Company. (a firm) and Handy Contractor Company Limited ; and that of Action 4449 to Handy Contractor Company Limited and Foo Siang Kiew . The negotiation of the terms of the Consent Summons continued. On 7 December 2006, a revised Consent Summons was sent to the Plaintiff s solicitors. On 11 December 2006, certain amendments to the draft revised Consent Summons were made by the Plaintiff s solicitors. Between December 2006 and early January 2007, contacts between the solicitors of both parties were made, although no conclusion was reached. On 30 January 2007, Kin Ko took out a Summons for summary judgment for Action 3695 and the hearing was heard on 14 May 2007. The application for summary judgment was refused and the Plaintiff was granted unconditional leave to defend. On 1 February 2007, the Plaintiff applied to enter default judgment for Action 4449 against the Defendant which was entered on 24 February 2007 as the latter did not file any defence. On 15 March 2007, the solicitors for the Defendant asked for the Plaintiff s consent to set aside the said default judgment. The request was ignored. As a result, the Defendant took out the present summons on 21 March 2007. On 23 March 2007, both parties took out a Consent Summons (pp.116 to 117 of the bundle) and it was agreed that there be an interim stay of execution of the default judgment pending the determination of the Defendant s application to set aside the said default judgment. On 27 April 2007, Kin Ho amended the name of the Plaintiff for Action 3695 from Kin Ko Construction & Engineering Company (a firm) to Foo Siang Kiew trading as Kin Ko Construction & Engineering Company. The Plaintiff s case It was alleged that between February 2002 and June 2002, at the request of the Defendant, the Plaintiff lent $110,000 to the Defendant in personal capacity. The loans were given to the Defendant by means of 3 cheques issued to Foo Siang Kiew. Despite repeated demands from the Plaintiff, the Defendant failed to repay the said loans. The Plaintiff denied that they had entered into a contract with Kin Ko. It was alleged that David Chow, at the material time the person in charge of the Tai Po Tolo Highway extension work for Handy, signed a contract with Kin Ko in the capacity of a witness to confirm that Handy had no objection to the contract (para.12 at p.127 of the bundle). The Defendant s case The Defendant claimed that the Plaintiff was a sub-contractor of SCG (HK) Ltd to do the soil work in the Tai Po Tolo Harbour extension work project. The main contractor was Hong Kong Construction (Holdings) Ltd and the main sub-contractor was SCG (HK) Ltd ( ). SCG sub-sub-contracted the soil work to the Plaintiff which sub-sub-sub-contracted the slope work to Chan Shun Kei Construction Work ( ) and CSK further sub-contracted part of the work to Kin Ko. CSK only settled $320,000 leaving a balance of

$692,260 outstanding. As such, Kin Ko stopped doing the work since November 2000. In February 2001, after a series of negotiation, David Chow of the Plaintiff was asked to execute a contract with Kin Ko and the Plaintiff was to assume all responsibilities under the contract. The Defendant was given a cheque for $100,000 as part payment. The construction work resumed on 14 February 2001 and was completed on 8 May 2001. The outstanding payments owed to the Defendant totalled $1,458,965.50. The Plaintiff had paid a total sum of $750,000 to the Defendant under the contract. It was alleged that the 3 cheques in question were given to the Defendant as part payment of the outstanding sums, not loans as claimed by the Plaintiff. Decision It is apparent that the version of events put forward by both parties is different. As such, it is not appropriate to try a case by relying solely on the affirmations. Clearly the case should proceed to trial proper so that factual disputes can be resolved. The default judgment was entered because the Defendant failed to file its defence in time. Such a failure can be explained by the fact that both parties were in the process of negotiating the consolidation of these 2 Actions to save time and costs. A Consent Summons was drafted (pp.9 to 11 of the bundle) and even the Plaintiff agreed to the interim stay of execution of the default judgment pending the determination of the Defendant s application to set aside the default judgment (p.120 of the bundle). It is my judgment that the Statement of Claim of Action 4449 could not be said as frivolous and vexatious. The disputes that need to be resolved and the rights to relief claimed therein, in my judgment, are in respect of or arise out of the same transaction; and it is desirable and just for these two Actions be tried at the same time. It is to be noted that the issue of consolidation however was not raised in the Summons which was issued by the Defendant and dated 21 March 2007. As such, I would not make any order as to the consolidation of these two Actions under Order 4 Rule 9(1). Order In the circumstances, I make the order as follows: the default judgment entered on 24 February 2007 in relation to Action 4449 (p.22 of the bundle) should be set aside under Order 13 Rule 9; the application to strike out the Statement of Claim of Action 4449 under Order 18 Rule 19 is dismissed; Costs of this application be to the Defendant, to be taxed if not agreed, with certificate for counsel. This shall be a Costs Order nisi and be made absolute 14 days after the date of the judgment. (Stanley Chan) District Judge Representation: Miss Koo Yeuk Lan instructed by Messrs. Tsang & Wong for the Plaintiff Ms. Yvonne Fong instructed by Messrs. Wong Poon Chan Law & Co. for the Defendant - PAGE A B C D E F G H 1udk 1udk (#p# >*6D :i#z *\mT zo/< xC&1 ({m8 =J+> P0} W~7gb W~7g xC&1 ({m8 =J+> n*\U & 6" Normal.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8


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Prepared on 26 October 2026 · Esheria