

HONG KONG / JUDGMENT

QUENTIN KEITH HILLS v. MARLENE RITA WITTMAN

COURT

Court of First Instance

DECIDED

26 April 2007

CASE / FILE NUMBER

HCA2149/2006

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bjbj HCA 2149/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE ACTION NO. 2149 OF 2006

BETWEEN QUENTIN KEITH HILLS Plaintiff MARLENE RITA WITTMAN Defendant

Coram : Before Master J. Wong in Chambers Date of Hearing : 20 March 2007 Date of Decision : 26
April 2007

DECISION

Applications

1. There are two applications before me. The Plaintiff asks for summary judgment and the Defendant seeks security of costs. Preliminary matter
2. The Defendant raised a preliminary matter in relation to her application for security of costs. Upon hearing from the parties, I granted leave to her to rely on the 2nd Affidavit of Christopher Paul Erving at the hearing before me with costs in the cause of her summons.

Background

3. On 28 September 2006, the Plaintiff commenced the present proceedings against the Defendant for recovery of balance of loan in the sums of US\$135,000. Particulars 13 Nov 2001 Original Loan 150,000 9 Mar 2005 Additional Loan 10,000 160,000 4 Nov 2005 1st Repayment 10,000 9 Dec 2005 2nd Repayment 15,000 25,000 135,000

4. The Defendant contested the proceedings and filed her Defence on 27 October 2006. Briefly, she did not dispute the Additional Loan and the 1st Repayment. However, she denied the Original Loan and pleaded that: 1. It is admitted and averred that in or about November 2001, in order to comply with new Securities and Futures Commission Regulations the Defendant's Company required to arrange a rights issue in order to raise funds to increase the company's capital base.
2. At that time the Plaintiff and the Defendant were engaged to be married. The Defendant discussed the rights issue with the Plaintiff who, rather than allow an existing minority shareholder to take up the rights issue and thereby become the majority shareholder, suggested that he should utilize funds he had available to take up the rights issue. The Defendant agreed and offered to reflect this investment in a shareholders agreement. The Plaintiff declined.
3. In the circumstances, at the time the payment of US\$150,000 was made by the Plaintiff neither party regarded it as a repayable loan. As to the 2nd Repayment, the Defendant explained that:
7. The payment made on 9th December 2005 was made at the Defendant's request to enable him to pay property taxes in respect of his property at Tiburon, California, United States of America as at the time he claimed to be short of funds. In view of the parties continuing relationship the Defendant was content to advance the money with no strings attached.
5. On 10 November 2006, the Defendant took out a summons against the Plaintiff for security of costs. The Plaintiff opposed to it and further issued an application for summary judgment on 18 December 2006. The Plaintiff deposed that:
3. Indeed, in the Defendant's Defence filed on 27th October 2006, she did not dispute that the total sum of US\$160,000 were deposited into the Defendant's nominated account. She merely denied that the money was advanced as a loan, but rather as an alleged investment in certain rights issue in the Defendant's Company some time in November 2001. I deny that the money was advanced to the Defendant for this alleged purpose. I further deny having any knowledge of the rights issue or any discussion with the Defendant in relation thereof. (Affidavit of the Plaintiff filed on 18 December 2006)
6. On the other hand, by her affidavit in opposition filed on 10 January 2007, the Defendant said that:
3. I regret that what is said in paragraph 3 of the Plaintiff's affidavit is simply untrue. The payments we made to each other during the course of our engagement to be married were never regarded by either of us as anything other than a demonstration of our love and affection for each other and our commitment for our joint future. All this changed when I broke off our engagement even to the extent of the Plaintiff demanding the return of the engagement ring he bought me.

7. The parties appeared before me on 20 March 2007. Mr. Jonathan Chang of Counsel acted for the Plaintiff and Mr. B. Erving of Messrs. Erving Brettell represented the Defendant. Having heard from the parties, I reserved my decision to be handed down. I now do so.

Ruling

8. Upon consideration of all the evidence authorities and submissions, I have come to the conclusion that summary judgment should be granted to the Plaintiff and the security for costs application is to be dismissed. My reasons appear as follows.

Reasons

9. The applicable law relating to summary judgment is clear now. There should not be any dispute. The underlying policy of summary procedure is to prevent the defendant from delaying the plaintiff from obtaining judgment in a case in which the defendant clearly has no defence. Two questions are to be asked. First, factually, is what the defendant says believable in light of disputed or indisputable circumstances? The Court is entitled to have regard to the commercial reality as well as to the contemporaneous documents. However, mini-trial on affidavit evidence shall not be embarked. Bare assertion is insufficient and the defendant must condescend upon particulars. Second, legally, if what the defendant says is believable, does it amount to an arguable defence in law. After all, the burden lies on the defendant to show triable issue or some other reason to be a trial.
10. Applying the above principles to the present case, the Defendant has failed me in a number of areas.
- (a) I agree with Mr. Chang that the Defendant has changed her case from investment in her company (as per the Defence) to gifts to her (as per her affidavit in opposition). Mr. Erving attempted to argue that the defence was always gifts only. I respectfully disagree.
- (b) Even assuming that the Defendant has always been pleading an alternative defences, investment or gift, both of them are unbelievable in light of the contemporaneous evidence adduced. The Plaintiff produced a series of e-mails communicated by the parties. These communications are fatal to the Defendant's case because she had never denied the debt when the Plaintiff chased up her for the same. As extracted by Mr. Chang in paragraph 10 of his skeleton:
- (1) 18/5/2006 P to D [B/19]: We need to start reaching an agreement on the repayment of the loan. Ignoring me is not going to make me go away nor is it going to help. D to P [B/18]: ve given you a response on your question on three different occasions in e-mail. I d look them all up for you but trust you can find them. Nothing has changed, other than I ve added one more obligation to the current two and involving monthly payments for mum. My hands are tied for a few months yet due to these obligations. 28/5/2006 P to D [B/21]: I am being forced to sell assets in a desperate attempt to survive and you are deliberately ignoring me and refusing to discuss repayment of the loan. D to P [B/20]: with the payment of my father s

estate's debts, plus the repayment to my brother, in addition to the loss of two retainers as of March, I could only begin to estimate a start to a repayment at the end of summer.

- (3) 19/7/2006 [specific reference to US\$135,000 not disputed] P to D [B/23]: Based on your comment that your business has never done better I would prefer payment of the full \$135,000 immediately please. Otherwise, \$30,000 per quarter beginning with Q3 2006. D to P [B/23]: I haven't heard back from my accountant as to my tax liability and I am asking him all the time for this. I can then figure out my total obligations.
- (4) 8/8/2006 D to P [B/25]: I am awaiting one item from my tax person re my US obligation and date due and can then give you a date and timing [i.e. for repayment of the loan].
- (5) 9/8/2006 D to P [B/26]: Finally got a response on my side re tax obligation, which is substantial due to amount of time spent in the US during 2005 and being taken away from shelters due to foreign residency. As it is due in one lump sum Sept 15, if you wish me to I will default on the US taxes owed and start on that date your previously quarterly plan. Pls let me know if this what you want.
- (c) To these e-mails, I have asked Mr. Erving to help me identifying those parties that might help his client. However, he was unable to dig out anything to support the defence(s) in any respect.
- (d) The Defendant further fails this Court to condescend any particulars or produce any evidence to support her case(s). Mere assertions are clearly insufficient to establish triable issues.
- 10. Since I have decided that summary judgment should be awarded to the Plaintiff, the security of costs application will collapse automatically. Costs
- 11. There is an order nisi that the Defendant shall pay costs of the Plaintiff in the proceedings and the 2 applications before me, including all costs reserved and Certificate for Counsel for hearing on 20 March 2007. (Jack Wong) Master of the High Court Mr. Jonathan Chang instructed by Messrs. Hampton Winter & Glynn for Plaintiff. Mr. B. Erving of Messrs. Erving Brettell for Defendant. - PAGE - A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V & 6" Normal.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 29 October 2026 · Esheria