

TA SECURITIES SDN BHD v LAU MAY FOONG [2003] MLJU 85

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HIGH COURT (KUALA LUMPUR)

SELVENTHIRANATHAN J


CIVIL SUIT NO D7-22-2396-1999

13 January 2003

Case Summary

Civil Procedure — Summary judgment — Appeal — Appeal against dismissal of application for summary judgment — Whether defendant merely acted as nominee for third party — Whether defendant coerced by third party to be nominee — Whether defendant authorized transactions — Whether credible issues raised by defendant to merit its going for trial

Nadzarin Wok Nordin with Yew Lee Ann (Nadzarin Sena), D. Paramalingam (*Krish Maniam & Co*)


Grounds of Judgment

Enclosure (13) was an appeal to the judge in chambers filed by the plaintiff on the 6th April 2001 in respect of the decision of the learned senior assistant registrar ["the registrar"], given on the 30th March 2001, dismissing with costs the application of the plaintiff for summary judgment under Order 14 of the Rules of the High Court 1980 ["the Order 14 application"] *vide* enclosure (5).

The plaintiff is a member of the Kuala Lumpur Stock Exchange ["the KLSE"] and is a licensed stockbroker. The defendant was a client of the plaintiff at all material times.

According to the plaintiff, the defendant applied for a margin-trading facility ["the facility"] with the plaintiff which was approved on the 3rd October 1994 and [*2] she was given an account number 55422 to trade under the facility. She then proceeded to trade in stocks, shares and other securities listed on the KLSE through the plaintiff.

Apart from the terms and conditions pertaining to the facility as contained in the letter of offer from the plaintiff dated the 3rd October 1994 [exhibit "P-1" to enclosure (4)] and the facility agreement [exhibit "P-2" to enclosure (4)], the credit limit available to the defendant was varied over a period of time from RM350,000.00 to a maximum of RM30,000,000.00. The facility was utilised and the plaintiff alleged that the outstanding debt of the defendant in respect of the facility as at the 21st February 1999 stood at RM27,131,765.76, with interest continuing to run at 21% per annum from the 22nd February 1999 until the date of full realisation of the debt.

The Order 14 application herein was supported by the affidavit of one Rabindran Thaver, the manager of the plaintiff's legal department, affirmed on the 21st July 2000 at enclosure (4).

The defendant affirmed an affidavit in reply on the 26th September 2000 at enclosure (6). In addition thereto, a total of six other affidavits were filed by the parties in relation to the Order 14 application. [*3]

Construing all the defendant's affidavits and the defence filed herein, the defendant essentially alluded to three ostensible issues for the consideration of the court. Firstly, the defendant alleged that she was acting merely as the nominee and/or agent for a person by the name of Jennifer Tay, an advocate and solicitor practising under the firm name of Messrs SK Tay & Co. The defendant stated that she verily believed that Jennifer Tay in turn acted on the instructions of one Patric Lim Hong Koon, who required the use of nominees and/or agents for his corporate dealings. She claimed that she had been influenced and induced by Jennifer Tay to become her agent and/or nominee and/or the agent and/or nominee for Patric Lim Hong Koon, that either one or the both of them had arranged with the plaintiff to open the facility account for such purpose, that the plaintiff knowingly participated in this scheme to profit from the transactions carried out pursuant thereto and that it was within the knowledge of the plaintiff that Patric Lim Hong Koon was the principal [of the defendant] and that it was so revealed in the facility agreement.

However, the abovesaid contentions of the defendant were bare allegations without any support of the same in the contemporaneous documentary evidence exhibited. If such bare allegations are accepted, it follows that any individual in the position of the defendant could easily raise the same allegations that the defendant did, ie she was acting for somebody else and not on her own even though the record says she was acting for herself. Without more, a bare allegation of this nature can never amount to a triable issue, [*4] particularly so when the plaintiff denied knowing Jennifer Tay or Patric Lim Hong Koon and further denied having entered into any such scheme as alleged and put the defendant to strict proof of the same. However, there was no credible documentary evidence to sustain the defendant's contention.

In the course of this appeal and also at the hearing before the registrar, the learned counsel for the defendant referred to the case of *Exquisite Merge (M) Sdn Bhd v Life Publishers Berhad* [1997] 3 AMR 2769 and relied upon the following passage in the judgment of Mahadev Shankar JCA where his Lordship stated as follows at page 2776 of the report of the case:

"... Where a contract is being concluded by two parties, both within Malaysia, the rule is that if one of them is known by the other to be contracting as an agent then he cannot sue or be sued on the contract. If in such circumstances the agent is to be invested with capacity to sue, and/or with personal liability for default, there has to be a contract to that effect which has to be proved"

to argue that, although the defendant admitted signing the agreement, "she was actually acting as the agent for... Jennifer Tay... who in turn was acting under the directions of... Patric Lim Hong Koon, who is currently under investigations and wanted by the Securities Commission". [*5]

It must be borne in mind that the above decision was arrived at in the context of section 183 of the Contracts Act 1950. There is no evidence whatsoever to suggest that the facts of this case could be said to fall within the ambit of the said section 183 or any of the limbs thereunder. More tellingly, the defendant did not take any steps to have the said Jennifer Tay and/or Patric Lim Hong Koon added as co-defendants in this action or as third parties against whom she could seek indemnification in respect of her liability to the plaintiff. She entered into the contractual relationship with the plaintiff as principal with her eyes wide open. Even if she had allowed herself to be manipulated by Jennifer Tay and/or Patric Lim Hong Koon, she could not deny being liable to the plaintiff on the contractual relationship between herself and the plaintiff as evinced by the available contemporaneous documents.

It could not be gainsaid that the only evidence available to support her contention that the defendant was purportedly contracting as an agent or nominee was the defendant's own bare allegations. However, there was no credible documentary evidence to suggest that the defendant so entered into the agreement, and her contention to the contrary was rejected.

The defendant further contended that the margin-trading account was tainted with illegality. In support of this contention, the defendant alleged that she was coerced and influenced by Jennifer Tay to be a nominee and/or agent for her and/or Patric Lim Hong Koon [paragraph 4.5 of enclosure (6)]. The [*6]

defendant further alleged that Patric Lim Hong Koon was currently under investigation and wanted by the Securities Commission [paragraph 10 of enclosure (8)]. The plaintiff denied any knowledge of this contention of the defendant as well.

As stated earlier, there was no credible evidence to suggest that the defendant concluded the contract with the plaintiff in her alleged capacity as a nominee and/or an agent of Jennifer Tay and/or Patric Lim Hong Koon, or the both of them. *Ergo*, in the absence of such evidence, there was consequentially no evidence to suggest that the defendant was

coerced and/or influenced as claimed. More importantly, the defendant by her own allegations revealed that she was not even sure as to exactly who her principal was so as to pinpoint that person specifically. Be that as it may, the crux of the defendant's allegation on the issue of illegality was at best only a bare allegation without any supporting credible evidence whatsoever. The court could not deduce any element of illegality from the letter of offer and the facility agreement to lend credence to the defendant's allegation. Nor was there any other extraneous evidence which could suggest any element of illegality as proposed by the defendant.

The defendant also contended in the alternative that in the event she had contracted with the plaintiff as principal [which she denied], she did not authorise any transactions for the purchase or sale of any securities as stated in the agreement. Again, on the assumption that the defendant did not authorise the [*7]

said transactions, it is rather peculiar that she did not raise any objection when the letters mentioned in exhibit "P-4" to enclosure (4) were sent to her or when her credit limit was increased over a period of time. Again, this contention of the defendant could not be accepted.

As for the submission of the learned counsel for the plaintiff that paragraph 10 and exhibit "LMF-1" in the defendant's second affidavit in reply [enclosure (8)] ought to be struck off for being "scandalous, irrelevant and oppressive", suffice for this court to say that since there was no formal application before the registrar in this regard and since this was also not reflected in the notice of appeal, there was no basis for the court to rule thereon one way or the other.

In the circumstances, as no credible issues were raised by the defendant in this case to merit its going for trial, the decision of the registrar on the Order 14 application was set aside and judgment was entered against the defendant as prayed for.