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IN CHAMBERS
IN THE GRAND COURT OF THE CAYMAN ISLANDS

GC CAUSE NO: 304 of 2006

BETWEEN

IAN DAWSON JAMES

Plaintiff

AND:

CAYMAN YACHT CLUB LIMITED

Defendant

BEFORE: The Hon. Madam Justice Levers

Appearance:

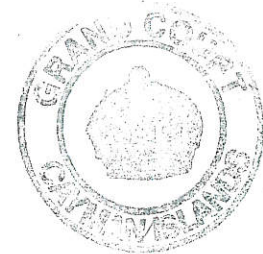
Counsel for the plaintiff: Mr. L. Freeman of Broadhurst Barristers

Counsel for the defendant: Mr. M. Crawford of Maples & Calder

Heard: 20th September 2006

JUDGMENT

Levers, J.



This is the Plaintiff's application for summary judgment of a specific sum claimed in the Statement of Claim with interest and costs pursuant to the GCR Order 14 Rule 1.



1 The Summons is supported by an affidavit of the Plaintiff. It is
2 opposed by the Defendant.

3

4 The Plaintiff seeks Summary Judgment on the ground that there is no
5 defence to the Plaintiff's claim.

6

7 BACKGROUND

8

9 The Plaintiff is a resident of the Cayman Islands and the Defendant is
10 a company incorporated in the Cayman Islands with registered offices
11 at Queens Gate House, 113 South Church Street, George Town,
12 Grand Cayman.

13

14 On or about July 2002, the Plaintiff entered into negotiations to
15 commence employment with the Defendant, and a written agreement
16 was concluded dated 4th September 2002.

17

18 The Employment Contract contains the usual conditions of salary etc
19 and an Entire Agreement Clause. (Clause 20.1 and 22.1). The
20 Plaintiff was employed as a Development Manager of the Defendant

1 for three years under the contract which was automatically renewable
2 for an additional period of three years, unless terminated by the
3 Plaintiff, upon six months written notice to the Defendant. Another
4 term in the contract worthy of mention is that, if the Defendant
5 required the Plaintiff to resign for reasons other than theft or fraud
6 then the Plaintiff would be entitled to receive a severance payment
7 equivalent to the balance of the fixed employment term or one year's
8 full salary whichever was greater together with the three percent
9 bonus entitlement referred to in the contract.

10

11 The Defendant became insolvent on or about the month of December
12 2005 and could not pay the Plaintiff. After several demands for his
13 wages, the Plaintiff found alternative employment, and continued to
14 live in the Cayman Islands. The Plaintiff's claim is for:

15

- 16 (a) Unpaid salary, expenses and loans and payments;
- 17 (b) Salary deficiencies;
- 18 (c) Severance pay;
- 19 (d) Car allowance;
- 20 (e) Telephone bills to June 2006;
- 21 (f) Health insurance;
- 22 (g) Pension contribution; and

1 (h) Interest.
2

3 The Defendant, on the other hand, alleges that the Plaintiff came to
4 an oral agreement with the Defendant, whereby the Plaintiff agreed to
5 await his remuneration as the Defendant was in the process of
6 negotiating a sale from which the monies due to the Plaintiff would
7 have been paid.
8

9 THE PLAINTIFF'S CASE
10

11 The Plaintiff asks for Summary Judgment on the basis that there is no
12 defence to the whole or part of the Plaintiff's claim. Mr. Freeman on
13 behalf of the Plaintiff submits that the test for determining whether a
14 Defendant has a real and bona fide defence is:
15

16 (1) What the Defendant saying credible?

17 (2) There a fair and reasonable probability of the Defendant having
18 a real bona fide defence?
19

20 The Plaintiff submits that the written agreement supercedes all else
21 especially since there is an entire agreement clause and that an oral

1 agreement cannot vary the entire agreement clause in the written
2 contract.

3

4 Mr. Freeman further submits that under the Labour Law payment of
5 wages is mandatory, that even though the Plaintiff found alternative
6 employment, there should be no deductions of the wages he earned
7 from the salary due under the written contract, and that the full salary
8 is due to him.

9

10 He submits that the expenses are reasonable, and that the Plaintiff
11 was not dismissed.

12

13 THE DEFENDANT'S CASE

14

15 The Defendant has filed a late affidavit with a draft defence attached
16 to it. Mr. Crawford of Maples of Calder on behalf of the Defendant
17 submits that the Defendant should be allowed to file his defence
18 because it has a credible defence to the allegations in the Statement
19 of Claim which are capable of success, namely:

20

1 (1) That in fact the Defendant believed that the Plaintiff had agreed
2 to forbear any demands for payments, pending realisation of
3 the Defendant's assets and that there was an agreement
4 between the Plaintiff and the Defendant in respect of the
5 Plaintiff's ongoing employment or role with the Defendant (this
6 is supported by the email correspondence);

7 (2) That there is a triable issue as to the proper construction and
8 effect of clause 12.3 of the contract of employment, (the clause
9 as to severance);

10 (3) That no demand was ever made by the Plaintiff in respect of his
11 outstanding salary; and

12 (4) The Plaintiff did not make any demands for the re-
13 imbursements.

14

15 I do not believe that (3) and (4) have any great merit and therefore, I
16 would, in coming to any conclusion deal with paragraphs (1) and (2)
17 alone. It is my view that the Plaintiff if certain conditions were fulfilled
18 would be entitled to his salary and no demand need have been made.

19

1 Mr. Crawford further submits that the pleadings are defective in that
2 they do not plead with specificity the date of the breach of the
3 contract, the expenses incurred especially in circumstance where the
4 defence is that the Plaintiff agreed to forbear the demand for the
5 salary till the Defendant had realized the sale of the land.

6

7 Mr. Crawford submits that the Plaintiff's defective pleading is
8 highlighted by his defective affidavit in support. For example, he
9 submits that he failed to verify the allegations in the Statement of
10 Claim as required by GCR Order 14 r1. He also submits that the
11 documentation annexed to the affidavit is irrelevant and should be
12 ignored; and that, in fact, no proper evidence is provided by the
13 Plaintiff for expenses.

14

15 The defence submits strenuously that it has an arguable and bona
16 fide defence. That there is an agreement to forbear and that the
17 Plaintiff is not entitled to a severance package, if the clause in the
18 contract (paragraph 12.3) is properly construed. That the Plaintiff has
19 taken it upon himself to describe the circumstances of ceasing to

1 work for the Defendant as a dismissal when there is evidence before
2 the court that the Plaintiff's services were retained by the Defendant.

3

4 THE LAW

5

6 Summary Judgment is a procedure whereby a Plaintiff can apply for
7 judgment against a Defendant, usually without proving the case at
8 trial. The policy behind the procedure is to prevent delay in cases
9 where there is no defence. As Lord Halsbury stated in Jacobs v
10 Distillery Company (1901) 85 Lt 262, HS:

11

12 "There are some things too plain for argument
13 and where they were (defences) put in simply
14 for the purpose of delay which only added to
15 the expense and where it was not in aid of
16 justice that such substance should continue
17 (summary judgment) under RSC, Order 14
18 was intended to put an end to that Statement
19 of Claim and to prevent sham defences from
20 defeating the right of parties by delay."

21

22 The application must be supported by a standard form of affidavit
23 verifying the facts of the claim and deposing to a belief that there is
24 no defence. The Defendant in turn can exhibit a draft defence to its
25 affidavit. A general denial of liability will not suffice. The affidavit must

1 condescend upon particulars per Lord Blackburn in Walingford v The
2 Mutual Society (1885) AC 685 at page 704. It must deal with the
3 specific allegations in the Statement of Claim and state the nature of
4 and facts in support of the defence. The Plaintiff should only apply
5 for Summary Judgment where there appears to be no defence to the
6 action at all. The burden of proof therefore is on the Defendant to
7 show that there is a triable issue. However, it is quite a different
8 matter as Lord Donaldson of Lynton MR said in RG Carter Limited
9 v Clark (1990) 1 WLR at page 578:

10

11 “If the issue of law is not decisive of all the
12 issues between the parties, or if decisive of
13 part of the Plaintiff’s claim, or if some of those
14 issues, is of such a character as would not
15 justify its being determined as a preliminary
16 point because little or no savings in cost would
17 ensue. It is an a fortiori case if the answer to
18 the question of law is anyway dependent upon
19 the undecided issues of fact.”

20

21 In Systems Control Plc v Munro Cooperate Plc (1990) BCC at page
22 386, leave to defend was given where an issue whether the Plaintiff
23 had irrevocably elected to treat a contract as discharged or whether
24 they could enforce it was held to be an issue which should be
25 decided at trial.

1

2 The Order 14 application is intended for liquidated sums where there
3 is no defence to the action in the Plaintiff's belief. I have to ask
4 myself the following questions, is this procedure appropriate to a case
5 for damages for breach of contract. The Plaintiff's Statement of
6 Claim asks for the following relief:

7 (1) Unpaid salary for six months;

8 (2) Expenses, loans, payments due as of June 2006. (No details
9 provided);

10 (3) Salary deficiencies. (No details provided and indeed 2006,
11 2007, 2008 estimated amounts);

12 (4) Severance pay;

13 (5) Car allowance (No details provided. No dates provided);

14 (6) Telephone to June 2006 (No details provided. No dates
15 provided);

16 (7) Health insurance – (No dates provided); and

17 (8) Pension contributions (dates provided but it goes on for the 3
18 years which opens itself to a question of construction of the
19 terms of the contract).

20

21 He also seeks interest on the amount that he claims is \$270,876.10.

22

23 It is my view that this a not an appropriate proceeding for this
24 particular case for the following reasons:

25

- 1 1. The Statement of Claim is not specific enough as to the loss
2 and expenses due as of June 2006;
- 3 2. There is evidence that the Defendant sought employment
4 elsewhere and it is therefore a question of construction of the
5 written contract whether (despite his income from an outside
6 source) under the terms of the contract and the law, the
7 payment of salary is mandatory and must be paid;
- 8 3. In circumstances where the Plaintiff and the Defendant agreed
9 to forbear from making a demand for the salary until the sale of
10 land was negotiated, whether the Plaintiff is entitled to have
11 commenced an action without a demand, and whether in fact
12 the Defendant is entitled to reasonable notice;
- 13 4. The Plaintiff does not sufficiently particularize the claim for car
14 allowance, telephone and this court would be hesitant to grant
15 Summary Judgment against a Defendant, not knowing whether
16 those expenses were incurred in the course of the alternative
17 employment or the employment contract under which this
18 action has been commenced;
- 19 5. It is also a question of construction whether there is an
20 entitlement to severance pay. This court is of the view that

1 Clause 12.3 in the circumstances of this case does not give rise
2 to an entitlement for severance pay, but this is a matter for the
3 trial judge.

4
5 For the above reasons, I dismiss the application for Summary
6 Judgment.

7
8 There is also a Summons before me filed by the Defendant for the
9 following relief:

- 10
- 11 1. That the time for filing its defence in this action be extended
12 until the 31st August 2006; and
 - 13 2. That the costs of and incidental to this application be costs in
14 the cause.

15
16 I find that there is in fact a defence which is not a sham. It is credible
17 and I therefore grant the relief sought in paragraph 1 of the summons
18 filed by the Defendant and grant the extension till the 31st October
19 2006.

1 THE QUESTION OF COSTS

2

3 It is usual for the Plaintiff to receive its costs when the Defendant has
4 not filed a defence in time. However, in the circumstances where
5 there was an agreement to forbear, a writ issued with no prior
6 demand or notice, the application for Summary Judgment must be
7 said to be an inappropriate application. I do not believe that costs
8 should be ordered against the defence. I therefore do not award
9 costs to either party, and order that the costs of and incidental to this
10 application be costs in the cause.

11

12 Dated this 12th day of October 2006

13

14

15 Judge of the Grand Court

