Embla v Elton [2014] DIFC SCT 074

Claim No. xxxx

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammed Bin Rashid Al Maktoum,
Ruler of Dubai
IN THE SMALL CLAIMS TRIBUNAL OF DIFC COURTS
BEFORE H.E. JUSTICE OMAR AL MUHAIRI

BETWEEN

EMBLA

Claimant

and

ELTON

Defendant

Hearing: 26 October 2014
Parties: The Claimant is represented by lawyer
Defendant attended via teleconference
Closing submissions: 03 November 2014
Judgment: 18 December 2014

JUDGMENT OF H.E. JUSTICE OMAR AL MUHAIRI

UPON this claim having been called on Sunday, 26 October 2014 for a jurisdictional hearing before H.E. Justice Omar Al Muhairi, on 28 October 2014 by Order of this Court the Defendant's application to contest jurisdiction was dismissed. Both parties were thereafter ordered to submit documents on which they seek to rely.
AND by Order of this Court the Defendant was hereby ordered to file and serve a reply to the Claimant's submissions by no later than Monday, 3 November 2014.

Background

1. The Claimant Embla, the management company of the XXXX Building in the DIFC, entered into a one year lease agreement with the Defendant Elton, for a two-bedroom apartment in XXXX, from 2 October 2013 to 1 October 2014.
2. Prior to the signing of this one year lease agreement, the Defendant occupied said unit for two years preceding the final lease agreement of October 2013, however this Court has not received any copies of tenancy contracts other than the one referenced above.
3. On 1 July 2012, a letter by XXXX, was sent to the owners of the XXXX units informing them that the air conditioning system at XXXX is supplied by the district cooling company and that as of 1 August 2012, the district cooling charges for individual units will be billable; broken down by consumption charges, demand charges, fuel surcharges and billing and administration charges. Should owners wish to have their tenants receive and pay for the district cooling invoices they must register their tenants by completing a tenant registration form.
4. Consequently, on 25 July 2012, XXXX sent a letter to the Defendant informing him that he was required to pay district cooling charges for his unit per clause 3.7 in the tenancy contract and that August and September 2012 invoices have been waived but that a security deposit of AED 3,000 must be paid to the building

management for the district cooling charges.
5. From the period of October 2012 to July 2013, district cooling charges were incurred, although it is unclear whether the Defendant understood that the Landlord was to continue paying the cooling charges or if the Defendant was aware of the charges imposed on him and disregarded them.
6. In August 2013, XXXX was appointed to collect the district cooling charges on behalf of Embla and sent an introductory welcome pack by e-mail and hand delivery to all tenants, which included an End User Agreement.
7. Prior to issuing any invoices, XXXX requested all tenants to sign the End User Agreement to ensure they fully understood the billing and collections process along with security deposits and all other relevant information. The Defendant Elton refused to sign the End User Agreement.
8. On 2 October 2013, the Claimant and the Defendant entered into the final lease agreement for one year ending on 1 October 2014 extending the lease period to a total of three years. No payment towards unpaid cooling charges was made at this time.
9. Past invoices were finally sent to the Defendant in December 2013 despite the fact that the End User Agreement was not signed.
10. On 8 December 2013, a disconnection notice was sent to the Defendant by XXXX indicating an unpaid balance of AED 2,575. The Defendant was informed that failure to make payment would result in disconnection of his cooled energy service and that although the Defendant had not registered with XXXX, fees for his unit were nevertheless being incurred. Furthermore, it would cost an additional AED 1,000 for the service to be reconnected once disconnected.
11. A second disconnection notice was sent to the Defendant by XXXX on 9 February 2014, indicating that his outstanding balance for cooled energy was forty-five days past the due date and that the new balance owed was AED 14,931.90.
12. From the January 2014 billing cycle onwards, monthly invoices were sent to the Defendant and the January invoice dated 24 February 2014, indicated that the Defendant owed a total of AED 16,486.36 in charges for the month of January as well as the outstanding balance.
13. On 18 March 2014, a legal notice was sent to the Defendant from Embla indicating that Elton has an outstanding bill of AED 16,511.36 and had also failed to sign the End User Agreement with XXXX, and that legal action will be taken against him should he not pay the past due bills within seven days from the date of the notice.
14. On 17 July 2014, the Defendant vacated the XXXX apartment and left the country.
15. On 28 September 2014, Claimant Embla filed a claim with the DIFC Small Claims Tribunal requesting a Court Order for the outstanding payment owed by the Defendant in unpaid district cooling charges in the amount of AED 24,103.76 as well as all legal fees and expenses related to the claim.
16. On 10 February 2014, the Defendant replied to the claim intending to contest jurisdiction and providing evidence that the claim was filed after he left Dubai to return to his home country of xxx.
17. A hearing was scheduled for 26 October before me, the Claimant's representative and the Defendant via teleconference.

The Hearing

18. On 26 October 2014, the hearing took place before me, the Claimant's representative Embla and the Defendant Elton by way of teleconference. It was established that the claim which arose out of the tenancy contract signed between the Claimant and the Defendant was wholly performed and implemented within the DIFC pursuant to explicit and implied terms stipulated in the contract. As such, the Defendant's application to contest jurisdiction was denied.
19. Furthermore, it was ordered that the Claimant file and serve on the Defendant the following: communication from xxxx regarding district cooling collections by xxxx, the original tenancy contract between

the parties, communication from XXX and building management regarding information on district cooling calculations methodology, invoices from October 2012 to August 2014 and a statement of account of outstanding district cooling bills until August 2014.

The Claimant's Submissions

20. The Claimant, Embla submitted the documents requested by the Court and maintains that the Defendant Elton is responsible for unpaid district cooling charges in the amount of AED 24,103.76.

The Defendant's Response and Position

21. The Defendant disputes the claim filed by the Claimant and argues that his first two years as a tenant at XXXX included cooling as part of the rental agreement, to be paid by the landlord. He contends that as rental values in Dubai increased, hidden charges were imposed by the building management team to compensate for the low rental prices, which represented more than thirty percent of the total rent.

22. Additionally, the Defendant contends that it was within his legal right to refuse to sign the End User Agreement with xxxx and as a consequence his cooling system was disconnected. As such, the Defendant believes he should not be charged for a cooling system unit that he was unable to use.

Discussion

23. The relevant provisions of DIFC law identifying the scope and provisions of applicable Real Property Law is set out in DIFC Law No. 4 of 2007; as amended by Law No. 4 of 2012.

24. The relevant clauses of the Tenancy Contract on Tenant's Rights and Obligations are provided in section three (3) which states that the Tenant undertakes to:

> *"3.7 Pay all charges for water, electricity, telephone, internet, air-conditioning, and district cooling unless agreed otherwise and any other utility connected to the Unit(s). Deposits for any and all utilities are the responsibility of the Tenant."*

25. The Tenancy Contract clauses relating to the Landlord's Rights and Obligations are provided in section four (4) which states that the Landlord undertakes to:

> *"4.7 Ensure that all Service Charges are paid on time;"*
>
> *"4.9 Clear all outstanding utility charges for the Unit(s) prior to the Commencement Date;"*

26. Section seven (7) of the Tenancy Contract provides for early termination by the landlord,

> ***"7. Early Termination by the Landlord***
>
> *7.1 Subject to the remedies available under law the Landlord may terminate the Tenancy Agreement prior to the Expiration Date if the Tenant:*
>
> *7.1.1 fails to rectify any breach of the Terms and Conditions of the Tenancy Agreement within forty – eight (48) hours of receipt of written notice from the Managing Agent and/ or Landlord, including but not limited to payment of the Rent;"*

27. After having reviewed in detail the relevant evidence submitted by both parties in addition to the submissions presented during the hearing, there are a few significant points that are pertinent to my decision in this case. Initially, according to submissions during the hearing and documents submitted by the Defendant, Elton maintains that he enjoyed two years at xxxx during which the cooling system was 'free' as part of the rental agreement. Although the tenancy contracts prior to October 2013 were not produced by either party, there is no evidence that contradicts this information, nor did the Claimant deny this submission whether through physical evidence or at the hearing.

28. Despite this, according to the Claimant, charges for cooling services commenced in October of 2012, presumably during the second year of Defendant's tenancy at xxxx. During that one-year period between October 2012 – October 2013, an alleged account balance of AED 13,452.59 accumulated (see Statement of Account, 26/10/2014), perhaps unbeknown to the Defendant as he maintains that air conditioning was 'free' as part of the rental agreement during his first two years of tenancy at XXXX.

29. What is most disconcerting about this calculation is that in December of 2013, after the first one year period in which service cooling charges allegedly commenced, the Claimant served the Defendant with a Disconnection Notice outlining the then current balance owed by Defendant as of December 2013, which was AED 2,575.00. How then, can the account balance in October of 2013, before the first Disconnection Notice was served, be more, let alone more than five times more than the alleged balance owed in December 2013?
30. Furthermore, the Claimant and the Defendant entered into a third Tenancy Contract agreement in October of 2013, a year after the cooling service charges allegedly commenced and by that time, according to the Claimant, the Defendant, Elton, already owed a sum of well over AED 10,000. Why then, was this outstanding balance not settled or collected at the time of the signing of the contract? Indeed, clause 4.9 of the Tenancy Contract states that the Landlord must clear, "all outstanding utility charges for the Unit(s) prior to the Commencement Date."
31. The fact that this outstanding service charge was not settled (in fact, there is no indication in the evidence by either party that the charge was even addressed at the time of the signing of the third Tenancy Contract), the Claimant effectively waived his right of implied powers to collect on the overdue service charge by failing to rectify (or even address) the breach of contract allegedly committed by the Tenant.
32. By way of illustration, even if the Claimant did try to collect on the overdue district cooling charges at the time of the signing of the third Tenancy Contract, the fact that the Defendant was served with a Disconnection Notice in December 2013, two months *after* the final contract was signed with a balance of AED 2,575.00, how then can the Claimant now suggest that the amount owed during the previous twelve month period (October 2012 – October 2013) was in fact AED 13,452.59, particularly when the Claimant understood cooling was allegedly 'free' and provided by the Landlord?
33. According to the evidence provided, it appears as though the first encounter at which the Defendant actually became aware of the new district cooling charges is sometime in August of 2013 when xxxx was appointed to collect district cooling bills on behalf of Embla. It is at this point that the Defendant refused to sign the End User Agreement and accepted the consequence that his cooling unit may be switched off, which we later learn is effectively the case when the Defendant received his first Disconnection Notice five months later in December 2013.
34. Notwithstanding the Defendant's knowledge of the new district cooling charges in August 2013 (and his refusal to sign the End User Agreement), the fact still stands that the Claimant waived his right to use his implied powers provided by the Tenancy Contract to terminate the contract or, at the very least, demand the outstanding utility charges on the unit when the final contract was signed in October 2013.
35. This brings us to the period from October 2013, when the parties signed the most recent Tenancy Contract to July 2014, when the Defendant vacated the unit and left the country.
36. The Defendant did not start receiving invoices from xxxx due to his refusal to sign the End User Agreement until December 2013.
37. It has already been established that a Disconnection Notice was sent on 8 December 2013 with an outstanding balance of AED 2,575; of which the failure to pay would result in a disconnection of the Defendant's cooled energy service. In addition to this, a second Disconnection Notice was sent to the Defendant exactly two months later on 9 February 2014, with a new outstanding balance of AED 14,931.90. How the outstanding balance jumped from AED 2,575.00 to AED 14,931.90 in just sixty days is lost on this Court. There is little explanation submitted by the Claimant as to the vast discrepancy in these two outstanding balances just two months apart aside from a collection of twenty-three backdated monthly invoices outlining consumption charges, heat loss adjustments, fuel surcharges, demand charges and meter administration charges; and a statement of account for Elton provided by xxxx Group dated 26 October 2014.
38.This brings me to the next significant point to consider. The Defendant maintains that his cooling unit was

switched off in December 2013 when he received the first Disconnection Notice in addition to repeatedly refusing to sign the End User Agreement with xxxx. The Defendant provides that at this time the air conditioning unit was disconnected and that he arranged his own cooling system from that point until he vacated the unit in July 2014. At no point was his cooling unit reconnected. These assertions have been provided by the Defendant and have not been opposed by the Claimant whether in physical evidence nor at the hearing.

39. Despite this, the Defendant continued to be charged for the district cooling charges, including consumption charges, every month until he vacated the unit in July 2014. According to the Court ordered document outlining the calculation methodology sent to the owners of xxxx units from xxxx on 1 July 2012 ("the Letter"), the methodology for calculating the district cooling invoices includes consumption charges, demand charges, fuel surcharges and billing and administration charges. According to the xxxx Letter submitted by the Claimant, the Consumption Charge comprises the following, *"This charge relates to actual consumption recorded on the BTU meter for the unit as and when the district cooling service is used"* (Emphasis added). Additionally, the Letter states,

> *"From 1st August 2012, the district cooling charges for individual units will be billed to the respective units as explained in this letter and the remainder of the bulk bill will be applied to the common areas and collected through service charges for the building. In accordance with the Sale and Purchase agreement (SPA) and the Body Corporate Constitutional documents, purchasers are obligated to pay for district cooling charges"* (Emphasis added).

According to xxxx, the management company appointed by xxxx to issue district cooling bills, consumption charges for individual units are calculated based on the *actual* consumption in the *individual units*, not common areas or facilities, but individual units. (Not to mention the fact that owners of the units are obligated to pay for district cooling charges and should they wish for their tenants to receive and pay for the district cooling invoices, they must register their tenants with a registration form attached to the Letter. There is no evidence provided by either party that the Defendant was registered).

40. Notwithstanding this, on the invoices dated December 2013 and onward (when the Defendant's cooling unit had already been disconnected), there is a significant consumption charge on each invoice costing anywhere from AED 84.79 to AED 770.52. How then, can a consumption charge have been calculated each month when the Defendant's cooling system unit was disconnected?

41. This brings me to my final point. Nowhere in the physical evidence submitted by the parties nor during the hearing was it communicated to this court that the Claimant relies on any type of authority, regulation, instruction or otherwise that permits them to impose these cooling service charges on their tenants. Instead, what the Claimant sought to do is introduce a charge which was never part of the original agreement and enforce it via xxxx through an End User Agreement which was not submitted to the Court.

42. The system put in place by the Claimant and xxxx was introduced *before* the signing of the final contract in October 2013. Therefore, it seems plain to me that had the parties agreed on this new charge, language to this effect should have been included in the final contract, not sprung on the tenant through an End User Agreement by a third party. Regardless of this, however, when the Claimant failed to exercise their right to terminate the agreement early, as provided in Clause seven (7) of the Tenancy Contract, for failure to rectify a breach, or at the very least settle the unpaid charges before or at the signing of the final Tenancy Contract in October 2013, the Claimant effectively waived their right to collect the outstanding amount allegedly owed by the Defendant.

43. For all intents and purposes, it has never been disputed that the Defendant otherwise paid his rent and other charges in full and in a timely manner. His conduct speaks for itself in terms of an otherwise fully compliant tenant, acting in good faith.

44. It is my opinion that it was well within the Defendant's right to refuse to sign the End User Agreement from xxxx particularly considering the fact that the Agreement materially changed the nature of his tenancy and obligations as a tenant, and therefore the Defendant is not bound by it.
45. In sum, it is clear through their actions, that the Claimant had a number of opportunities to forfeit or bring the Tenancy Contract to an end. They did not. Not only did the Claimant know there was a purported breach of the Tenancy Contract, they chose not to take any meaningful or definitive action and instead thought it appropriate to renew the Tenancy Contract for another year.
46. To that end, in waiving their right to take action, the Claimant continued to receive payment of the Defendant's rent and Elton continued to settle all other charges. At all material times, the Tenancy Contract was otherwise valid and performed.
47. I am further fortified in this view when considering the fact that when invoices were finally communicated to the Defendant in December of 2013, the cooling unit was disconnected and never reconnected until he vacated the property.
48. After carefully reviewing the evidence provided by both parties, it is my view that the Claimant's claim be dismissed in full. Furthermore, should the Claimant wish to file a claim of similar nature to this Court in the future, it should be noted that an authority, regulation, instruction or otherwise must be cited that clearly elucidates the authorisation given to the Claimant to impose these charges on their tenants.

Holding

49. For the reasons set out above, it is hereby ordered that the Claimant's claim is dismissed.
50. Each party to pay his own costs.

Issued by
Nassir Al Nasser
Judicial Officer
Date: 21 December 2014
At: 2pm