Claim No. SCT 162/2016

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

BEFORE SCT JUDGE NATASHA BAKIRCI

BETWEEN

GERONIMA

Claimant

and

GERTIE RESTAURANT

Defendant

Hearing: **8 November 2016**

Judgment: **13 December 2016**

JUDGMENT OF SCT JUDGE NATASHA BAKIRCI

UPON this Claim having been called on 20 October 2016 for a Consultation before SCT Officer Mahika Hart

AND UPON the parties not having reached settlement

AND UPON a Hearing having been held before me on 8 November 2016, with the Claimant in attendance and the Defendant failing to attend

AND PURSUANT to RDC 53.61 which provides that if a defendant does not attend the hearing, the SCT may decide the claim on the basis of the evidence of the claimant alone

AND UPON the Defendant having been given the opportunity to provide additional written submissions after listening to a recording of the Hearing

AND UPON reading the documents submitted in the Court file and hearing the Claimant's arguments at the Hearing

IT IS HEREBY ORDERED THAT:

1.The Defendant shall pay the Claimant AED 31,800 pursuant to the Sale and Transfer Agreement executed between the parties.

2. The Claimant's claims for salary, notice period and gratuity are dismissed.

3. The Defendant shall reimburse the Claimant for a portion of the Court Fee in the amount of AED 636.

THE REASONS

Parties

4. The Claimant, Geronima, is an Armenian national who owned and worked at Company LLC. He transferred his trade license in the aforementioned establishment to the Defendant company.

5. The Defendant, Gertie Restaurant is a DIFC registered establishment owned by Shareholder 1 and Shareholder 2 (together referred to as the "Current Shareholders").

Background

6. The Claimant owned, operated and worked at Company LLC, a restaurant in the DIFC which operated in a retail unit in Retail Towers (hereafter referred to as the "Premises"). He was allegedly subject to an Employment Agreement entered into between himself and Company LLC, on 23 April 2014, with his position of "General Manager" to begin on 20 May 2014.

7. In January 2016, the Claimant and the Current Shareholders came to an alleged informal agreement that the Current Shareholders would take over the business and the Claimant would stay on as General Manager. There is dispute between the parties as to the substance of the agreement reached in January 2016, but the parties agree that the Current Shareholders took over the lease agreement for the Premises and began to pay the rent in January 2016. No transfer of the shares in the Company LLC occurred at this time.

8. While the Claimant contends that the restaurant was fully operational in January 2016, the parties agree that the Current Shareholders sought to spend some time re-branding and making changes in the restaurant concept such that required a break in operation. The Claimant expected that the restaurant would open again in May 2016, when he would resume work as the General Manager, but it did not, allegedly due to issues with the alcohol license.

9. On 25 July 2016 the parties entered into a Share Sale and Purchase Agreement (hereafter referred to as the "SSP Agreement") in order to transfer the shares of Gertie Restaurant & Coffee Shop, formerly known as Company LLC, to the Current Shareholders and formalise their informal agreement from January 2016. It is unclear from the case file when Company LLC was formally renamed Gertie Restaurant & Coffee Shop, but the parties are in agreement that this occurred before execution of the SSP Agreement. The SSP Agreement, in relevant part, states:

> "2. SALSE [sic] AND PURCHASE OF SHARES
>
> . . .
>
> 2.2 The sale shall include the 100% Of the Company's shares along with its trade license with all its existing building structures, movable and immovable assets, licensing, fittings, leasehold and manpower. All revenues, income, earnings and cash balance, debtors, creditors, liabilities or obligations occurred before the execution of the Share Sale and Purchase Agreement shall be deemed property of the First Party and the Second Party.
>
> 2.3 In consideration of the sale of 100% of the ownership and interest in the shares, Third Party and the Fourth Party agree to pay to the First Part and the Second Party, and the First Party and Second party agree to receive from the Third Party and the Fourth Party the Sum of AED 331,800 (three hundred thirty one thousand eight hundred dirham). Out of this AED 300,000 (three hundred thousand dirham) was paid to the First Party and the Second Party before the execution of this Agreement, and the balance of AED 31,800 (thirty one thousand eight hundred dirham), will be paid to the First Party and the Second Party after the completing the transfer of the shares under the name of the Third Party and the Fourth Party.
>
> 2.4 The First Party and the Second Party' signature on the last page of the Agreement shall stand as an evidence of their receipt of the sum AED 300,000 (three hundred thousand dirham).
>
> 2.5 The First Party and the Second Party declare that they received all their benefits in the Company including the profits for years of their partnership in the company. No one of them can refer to the Company or to the Third Party or the Fourth Party in any right in this regard, and the First and the Second Party fully discharge the Company, the Third Party and the Fourth Party from any kind of liability."

10. Furthermore, the SSP Agreement defines the parties as follows:

> a. The "First Party" is defined as Partner, who was in partnership with the Claimant regarding Company LLC.
>
> b. The "Second Party" is defined as Geronima, the Claimant in the case at hand.
>
> c. The "Third Party" is defined as Shareholder 1, one of the Current Shareholders of the Defendant company.
>
> d. The "Fourth Party" is defined as Shareholder 2, the other Current Shareholder of the Defendant company.

11. On 9 October 2016, the Claimant filed a Claim Form in the DIFC Courts Small Claims Tribunal (SCT). The Defendant initially responded to the Claim Form on 16 October 2016 indicating its intent to defend against all of the claim. The parties attended a Consultation on 20 October 2016 but were unable to reach a settlement.

12. On 8 November 2016, I heard only the Claimant's arguments at a Hearing, pursuant to Rule 53.61 of the Rules of the DIFC Courts (RDC), as the Defendant failed to attend. I allowed the Defendant additional time to listen to a recording of the Hearing and provide written submissions in response, which the Defendant provided via email on 13 November 2016. Although the Defendant requested to have an additional Hearing or meeting with the Judge, I determined that the Defendant has been given sufficient opportunity to hear and respond to the arguments made at the Hearing.

The Claim

13. The Claim Form of 9 October 2016 indicated that the Claimant was seeking USD $ 66,481.56 (equivalent to AED 244,319.73) as compensation for 5 months' salary, 1 month's notice period, gratuity and the balance payment of AED 31,800 due pursuant to the SSP Agreement. The Claimant did not elaborate on his claims, provide a breakdown of the amounts allegedly owing, or provide any supporting documentation with his initial Claim Form.

14. The Claimant elaborated on his claim on 2 November 2016. He argued that he was originally employed by Fukurou House as General Manager. He also was a shareholder of that company. He maintained that when the Defendant took ownership of Company LLC, it also took responsibility for his employment, pursuant to UAE Labour Law Article 126, and thus he is owed salary for the months of May until September. He asserted that he resigned from his position in September and is thus owed a 1 month notice period and his gratuity for 2 years and 4 months of employment.

15. The Claimant further argued that when the parties transferred the lease agreement, there was no connecting termination of his employment. Furthermore, when the SSP Agreement was executed on 25 July 2016, Clause 2.2 indicated that the Defendant would take over the trade license along with existing "manpower." The Claimant contended that this phrase "manpower" includes his employment arrangement.

16. Furthermore, the Claimant contended that although the Defendant claimed that it had already paid him the AED 31,800 owed pursuant to the SSP Agreement, there is no evidence of such payment.

17. At the Hearing, the Claimant addressed certain issues pertaining to some paintings left in the Premises and the expectations of the Defendant that the Premises were covered by an existing alcohol license but as neither of these issues have been included in the Claim Form I cannot take them into consideration.

The Defence

18. The Defendant indicated its intent to defend against the claim on 16 October 2016 when filing an Acknowledgment of Service, but provided no supporting documentation. After the Consultation, the Defendant provided a submission and supporting evidence on 29 October 2016.

19. The Defendant first argued that the Claimant was never a salaried staff member of Gertie Restaurant, although it acknowledged that Gertie Restaurant was formerly known as Company LLC. The Defendant admitted to purchasing Company LLC from the Claimant and changing the name to Gertie Restaurant LLC.

20. The Defendant argued that as the Claimant was a shareholder of Company LLC, his claim for salary is untenable. No offer letter or separate employment agreement was entered into between the Claimant and Defendant.

21. The Defendant argued that it took over the lease agreement for Company LLC in January 2016 and paid all pending rent.

22. Further, the Defendant argued that the Claimant had already received AED 31,000 of the AED 31,800 owed to him under the SSP Agreement and was to be given the additional AED 800 upon his providing a receipt for the initial amount. The Defendant contended that the Claimant never returned for the remaining amount. The Defendant asserted that it has witnesses who saw the Claimant receive the payment of AED 31,000 in cash but offered no witness statements, testimony or other evidence to prove this.

23. Finally, the Defendant argued that the Claimant had misrepresented the status of an alcohol license for the Premises, stating that the Claimant indicated that there was already a "No-Objection" letter for selling alcohol on the Premises, which turned out to be untrue. Therefore the Defendant expressed an intent to claim AED 200,000 against the Claimant for "selling his restaurant with false information." The Defendant did not file a formal counterclaim and thus this claim will not be addressed further.

The Hearing

24. At the Hearing, the Claimant generally reiterated his arguments and the Defendant's representatives failed to attend allegedly due to traffic.

25. The Claimant contended that he owned Company LLC restaurant, which was not doing well, and thus he decided to sell the business. In January 2016, the Current Shareholders took over the lease agreement for the restaurant Premises and the Claimant believed that operation of the restaurant would resume in a few weeks with him staying on as the General Manager. The parties did not enter into a written agreement at this time for transfer of the trade license and shares, but the Claimant alleged that the understanding was that the Current Shareholders would purchase the trade license at a later time.

26. The Current Shareholders allegedly sought time to adjust the theme of the restaurant, and therefore closed the Premises in January 2016 and told the Claimant that the restaurant would re-open in May 2016. The Claimant contended that business did not resume in May 2016 as the Current Shareholders were for an alcohol license. However, the Claimant argued that as the business was supposed to re-open in May, he is making an employment claim for unpaid salary starting in May 2016. From May 2016, the Current Shareholders had made excuses as to why the restaurant remained unopen. The Claimant contended that he could claim from January for salary, but he said he was being reasonable and claiming from May instead.

27. The Claimant maintained that after May 2016, the Current Shareholders did not return his attempts at communication. He admitted that he had initiated an absconding case against one of the owners of the Defendant company, because he could not get in touch with any of the owners. The Claimant then informed the landlord of the Premises that the Current Shareholders were not responding and thus should not be allowed to do anything under his trade license, at which time the Current Shareholders came for a meeting.

28. This meeting occurred in July 2016, during which the Current Shareholders allegedly made some excuses as to their silence. The parties agreed at this time to sign the Share Sale and Purchase Agreement, which allowed the Claimant and his partner to transfer the shares to the Current Shareholders for the price of AED 331,800. The SSP Agreement includes existing "manpower." Thus, the Claimant contended that pursuant to the SSP Agreement, he is still employed by the Defendant company. The Claimant argued that after the parties signed this agreement on 25 July 2016, the Defendant again stopped responding to the Claimant.

29. The Claimant asserted that he had made numerous calls and sent messages and got no response. Therefore, he decided to bring a claim in the DIFC Courts. The Claimant argued that, although the Defendant claimed that it had already paid him, there is no evidence of such payment. The Defendant has not provided any evidence of its payment of AED 31,800 to him.

30. The Claimant alleged that he resigned from his job on 28 September 2016 via email. From 6 September 2016, the Claimant had been emailing the Defendant's lawyer to organise his final payments. On 25 September 2016, the Claimant received a response from the Defendant's lawyer stating that they could not give him any advice.

31. The Claimant clarified his claim to be for AED 31,800 pursuant to the SSP Agreement, six months of salary from May until September 2016, 1 month's notice, and gratuity pursuant to the DIFC Employment Law. The Claimant said that the Defendant had chosen not to open the restaurant, which was fully operational, and thus they should still pay him his salary pursuant to his Employment Agreement as required by the SSP Agreement.

32. The Claimant provided an unsigned copy of his Employment Agreement at the Hearing. He claimed that the signed copy of the Employment Agreement was not available to him as it remained at the restaurant Premises or with the DIFC Government Services Office.

The Defendant's Post Hearing Submission

33. As the Defendant was not present at the Hearing, I gave it the opportunity to listen to the Hearing recording and make further written submissions. The Defendant provided such submissions via email on 13 November 2016. The Defendant argued that although the Claimant contended to be the General Manager of the restaurant, he had not been present at the Premises during work time since early 2016. Furthermore, the Claimant has no offer letter or salary certificate from the Defendant and was not an employee there.

34. The Defendant acknowledged that it had kept the Claimant's employment visa valid in good faith to enable him to find another job after selling the business to the Current Shareholders. Finally, the Defendant argued that the Claimant was not an employee of the previous establishment, Company LLC, as he was instead a shareholder. Thus, his resignation had no effect. Otherwise, the Defendant reiterated its previous claims.

Discussion

35. The DIFC Courts and the Small Claims Tribunal have jurisdiction over this case as it concerns alleged employment within the DIFC and transfer of commercial property in the DIFC. The SSP Agreement states at Clause 8, "Governing Law and Jurisdiction" that "This Agreement shall be governed and construed by the laws of the Dubai International Financial Centre. . . Any disputes or differences arising out of, or in connection with, this Agreement, including any question regarding its existence, validity or termination, shall be subject to the jurisdiction of the courts of the Dubai International Financial Centre." Furthermore, the amount in question does not exceed AED 500,000.

36. The Claimant has effectively made two claims, one for his alleged benefits and entitlements due as an employee of Company LLC and subsequently Gertie Restaurant LLC and a second for payment owed under the SSP Agreement entered into between the parties. I will address each of these claims in turn.

A. The Employment Claim

37. The Claimant claims salary from May until September 2016, 1 month's notice period and end of service gratuity as his employment entitlements from the Defendant. He has not quantified the exact amounts of these individual claims. His argument as to his entitlement to these amounts from the Defendant hinges upon two documents.

38. First, the Claimant submits an Employment Agreement between himself and "Company House" dated 23 April 2014. This version of the agreement is not signed or executed. He argues that he was the General Manager of Company LLC restaurant and was meant to stay on as an employee for the Defendant.

39. Second, the Claimant submits the SSP Agreement executed between the parties on 25 July 2016. Clause 2.2 of that Agreement reads:

> "The sale shall include 100% Of the Company's shares along with its trade license with all its existing building structures, movable and immovable assets, licensing, fittings, leasehold and manpower. All revenues, income, earnings and cash balance, debtors, creditors, liabilities or obligations occurred before the execution of the Share Sale and Purchase Agreement shall be deemed property of the First Party and the Second Party."
>
> The "Second Party" is defined on the first page of the Agreement as the Claimant, "Geronima."

40. It is for the Claimant to meet the initial burden of proof in support of his employment claim. As regards an employment claim, the alleged employee must generally prove that he or she was employed and did work for the employer with various types of evidence admissible as proof of the matter.

41. In this case, the Claimant has submitted an Employment Agreement, drafted as between himself and "Company House" that is not signed or otherwise executed. He has also submitted his resignation letter, addressed to "HR Manager" without any proof that it was sent to or received by the Defendant. He argues that when the Defendant purchased his trade license, pursuant to the SSP Agreement of 25 July 2016, Clause 2.2 included "manpower" and thus the Defendant was his employer, bound to provide any employment entitlements owed to him.

42. The Defendant, in response, has maintained that the Claimant was never its employee. It has not addressed the Claimant's specific argument regarding Clause 2.2 of the SSP Agreement but has consistently claimed that no salary or other employment benefits are owed to the Claimant as he was not an employee of the Defendant company.

43. I find that the Claimant has not met his burden of proof to show he was an employee of the Defendant company entitled to any salary or employment benefits. The Employment Agreement upon which he relies is not signed or executed and seems to contain contradictions and errors which suggest that it is not in final form.

44. While the Claimant claimed that the signed version was available at the Defendant's Premises or at the DIFC Government Services Office, he did not provide any evidence of his attempts to obtain this document nor did he seek the Courts' assistance in accessing this alleged document. Furthermore, while the Claimant has shown that he was likely on the Defendant's visa, this fact alone does not help to support his claim that he was a bona fide employee of the Defendant company as he would be expected to have previously been on an employment visa of Company House when he was the owner.

45. As the Claimant has not met his initial burden of proof to show that he was an employee of the Defendant, only submitting an unsigned and incomplete Employment Agreement, I find no need to further assess his arguments regarding Clause 2.2 of the SSP Agreement. Thus, the Claimant's claims for payment of salary, notice period and gratuity from the Defendant are dismissed.

B. Claim for Payment under the SSP Agreement

46. The Claimant also claims AED 31,800 due to him pursuant to Clause 2.3 of the SSP Agreement. He essentially claims that he has proven that

this sum is due to him by producing the signed and executed SSP Agreement and the Defendant has failed to prove that it has paid him this amount.

47. The Claimant's argument is convincing on this point. Clause 2.3 of the SSP Agreement clearly states that "AED 31,800 (thirty one thousand eight hundred dirham), will be paid to the First Party and the Second Party after the [sic] completing the transfer of the shares under the name of the Third Party and the Fourth Party." This sum is due pursuant to the SSP Agreement, which the Claimant has produced. Thus, the Claimant has met his burden of proof to show that AED 31,800 is owed to him, as he is the Second Party to the SSP Agreement as well as the First Party's representative. Once the Claimant has met his burden of proof on this claim, it is for the Defendant to prove its defence.

48. The Defendant's defence against this claim is that it already paid the Claimant AED 31,000 in cash but failed to keep a receipt or record of this transaction. Instead, the Defendant claims that there are witnesses to the exchange of cash but has not provided witness testimony in written or oral form. In this regard, the Defendant has failed to prove its defence. It is unreasonable for a business entity to be unable to prove that a payment of AED 31,000 was made. Thus, as I have seen no evidence to suggest that the Claimant has received the AED 31,800 clearly owed to him pursuant to the SSP Agreement, I find it appropriate to grant the Claimant's claim for AED 31,800.

C. Costs

49. Usually, in the Small Claims Tribunal, when the Claimant succeeds in the claim, it is appropriate to grant him or her reimbursement of the Court Fee pursuant to RDC 53.70(1). In this case, as the bulk of the Claimant's claim was for salary, notice period and gratuity and he was only successful on his contract claim for AED 31,800, I find it inappropriate to shift the burden of the Court Fee in its entirety.

50. Instead, it is appropriate to shift the portion of the fee applicable to the AED 31,800 awarded to the Claimant. This amounts to AED 636, calculated as 2% of AED 31,800.

Findings

51. The Defendant shall pay the Claimant AED 31,800 pursuant to the Sale and Transfer Agreement executed between the parties.

52. The Claimant's claims for salary, notice period and gratuity are dismissed.

53. The Defendant shall reimburse the Claimant for a portion of the Court Fee in the amount of AED 636.

Issued by:

Natasha Bakirci

SCT Judge

Date of issue: 13 December 2016

At: 2 pm