

TERRITORY OF ANGUILLA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO 2011/0024

BETWEEN:

JOSEPH PATRICK HYLTON

Respondent/Claimant

AND

LEANDRO P. RIZZUTO

Applicant/1st Defendant

ANGUILLAN DEVELOPMENT CORPORATION LTD. dba
CUISINART RESORT & SPA

Applicant/Second Defendant

Appearances:

Mrs Tara Ruan for the Applicants/Defendants

Ms Ayodeji D Bernard for the Respondent/Claimant

.....
2011: October 31
2012: February 24
.....

Introductory

RULING

[1] LANNS, M: Leandro Rizzuto and Anguillian Development Corporation LTD apply to the Court for the following orders:-

1. That the Claimant was not employed in his personal capacity and ought to be substituted with the Company registered as Joseph Hylton Managers, Inc;
2. That the First Defendant Leandro Rizzuto be removed as a Defendant;
3. That the Claimant be ordered to give security for costs in the proceedings in the sum of US\$20,000.00;

4. That there be no order as to costs.

[2] The grounds on which the applicants have based their application are:-

1. There has been no cause of action that arises against the First Defendant in his personal capacity. The First Defendant is one of the directors of the 2nd Defendant. He did not enter into any agreement with the Claimant;
2. The Claimant is a non-resident of Anguilla and does not live on the island. The Claimant has no known assets in the jurisdiction that could satisfy costs if his claim were unsuccessful;
3. CPR 19.3 and 24.24.3 (g).

[3] The application was supported by affidavit. Mr Hylton filed affidavit in opposition and the Applicants filed affidavit in reply to the affidavit in opposition.

Brief background facts and nature of the action

[4] The Claim was commenced by Claim Form and Statement of Claim filed on 3rd May 2011. The Claimant (Mr Hylton) claims that since around November 2011 he has been employed under a contract of service to the Defendants to work on the completion of six new ocean villas, two additional villas and fifty six unit condominiums. He says that the terms of the contract were negotiated by the First Defendant (Mr Rizzuto) on behalf of the Second Defendant, (ADC) He said that he accepted the terms of the contract. Mr Hylton says he at all times viewed himself as an employee of Mr Rizzuto and ADC under a contract of service, based on representations made to him by them and or their agents, and by their conduct. Mr Hylton pleads that since his employment he performed his duties under the contract of service in a satisfactory and competent manner with a view to ensuring that the highest standard of construction were met, and that the property was secured.

[5] Mr Hylton says that with the imminent passage of Hurricane Earle, he secured the Defendants' property and then left for St Thomas, United States Virgin Islands to secure his personal property. He intended to return to Anguilla on 30th August 2010, but the passage of the Hurricane disrupted his travel; so he was unable to return before 2nd September 2010.

[6] When he returned to Anguilla, the Applicants/Defendants handed a letter of termination to the Claimant. The letter was signed by Mr Rizzuto. It is in the following terms:

"August 31st 2010

To: Joe Hylton

From: Leandro P. Rizzuto

Dear Joe

I am really disappointed that you left Anguilla knowing that Hurricane Earl was coming after you had told me that you would be staying on the project to finish the Chilled Water System. As soon as I turned my back you leave me and now you can't get back on island

This letter is to inform you that our relationship is ended and I don't need you back. I tried to support you with the government but it is a losing battle and it is apparent you don't care about your reputation with me or anyone else.

Take this letter as notice of termination immediately.

Leandro P. Rizzuto

Cc Richard Margulies"

[7] As can be seen, the letter takes on a personal tone. It is not on ADC's letter head. Mr Rizzuto does not say in what capacity he signed. ADC's seal was not affixed.

[8] Mr Hylton treated the letter as a breach of contract of employment and issued a claim form with statement of claim alleging that the Applicants/Defendants have breached the contract of employment and failed to compensate him for the unexpired portion of the contract. Mr Hylton says that as a result of such breach, he suffered loss and damage.

[9] Mr Hylton particularized his alleged loss as follows:

1. The sum of US\$87, 503.01 for pay in lieu of notice;
2. Loss of outstanding sums due under the contract of Employment, from 1st January 2010 through August 31st 2010 in the sum of US\$33,333.33;
3. Loss of wages as a result of the termination from 1st September 2010 to date of filing in the sum of US\$175,001.22 and continuing;
4. Loss of reputation;
5. Solicitor's fees in the amount of US\$10,000.00.

[10] In his prayer for relief the Claimant claims

1. Damages for pecuniary loss;
2. Damages for non –pecuniary loss;
3. Damages for loss of reputation
4. Interests and costs.

[11] By way Defence and counterclaim, the Applicants assert among other things that Mr Hylton was not operating under a contract of service to the Applicants/Defendants but

rather Mr Hylton provided project oversight services on behalf of the Company called Joseph Hylton Construction Managers, Inc. (JHCM). Specifically, the Applicants/Defendants state that Mr Hylton is not a proper party to petition the court, as there were no contractual agreements entered into with Mr Hylton in his personal capacity. They say that JHCM was retained as general project managers to oversee construction of six ocean villas. Additionally, they say that the role of the general project manager was to project plan, manage stake holders and team, manage project risk, schedule, budget and quality control, ordering materials and securing the project site.

- [12] ADC counterclaimed for damages for negligence and breach of contract. It repeated the averments in the Defence and further averred that Mr Hylton failed to supervise the project as a reasonable project manager, and his excessive absenteeism from the project caused substantial losses for ADC.
- [13] By way of Defence to the Counterclaim, Mr Hylton admits that he was a project manager, but denies all other averments set out in the counterclaim. Further, Mr Hylton says that he is embarrassed in defending the counterclaim since it lacks material particulars.

Submissions

- [14] The parties filed submissions in compliance with the order of the court given at a case management conference, and counsel for the parties addressed the court briefly.
- [15] During the course of her submissions, Ms Ayodeji Bernard, learned counsel for the Defendants, essentially narrowed the issues for determination by indicating that she was not strenuously opposing the application for the removal of the First Defendant as a party to the action. Aside from that indication, counsel offered no submissions in relation to that limb of the application which seeks to remove Mr Rizzuto as a Defendant in the action.
- [16] Given that indication of counsel, and the court, having examined the pleadings, in particular paragraph 6 which is to the effect that the terms of the “contract of service” were negotiated by the First Defendant on behalf of the Second Defendant”, I make a finding that there is no conduct by the First Defendant that requires him to be joined as a party to the action. He is therefore removed as a Defendant in the action.
- [17] With this finding, the issues for determination narrows to a single issue, that is, whether or not JHCM should be substituted for Joseph Patrick Hylton.
- [18] Learned counsel for the Applicants/Defendants (Mrs Ruan) submits that the application relies on the court determining three questions. Curiously, Mrs Ruan posed the questions and suggested the answers:

“a. Whose services were retained? We submit the services of Joe Hylton Construction Managers Inc were retained and not Joseph Hylton in his personal capacity.”

“b. Who retained the services? We submit that the 2nd Defendant retained the services and paid entirely for those services.”

“c. In what capacity did Joseph Hylton work? Joseph Hylton was project manager, (independent contractor) who was the principal of the Company. Joseph Hylton was an employee of Joe Hylton Construction Managers Inc and not Anguillan Development Corporation Ltd or Leandra Rizzuto.”

- [19] The further submissions on behalf of the Applicants/Defendants repeated the averments in the Defence.
- [20] Mrs Ruan then went on to outline the role of the general project manager and asserted that those roles are indicative of those of an independent contractor and not of an employee. So far as Mrs Ruan was concerned, Mr Hylton provided project oversight services on behalf of JHCM and was never an employee of Mr Rizzuto or ADC.
- [21] The documents upon which ADC rely to contend that Mr Hylton was never an employee of Mr Rizzuto, and to show that he was never employed by ADC in his personal capacity are exhibited to the second affidavit sworn by Stephane Zaharia.
- [22] Exhibit “SZ 3” is a document called “Contractor Prequalification Form” which makes reference to the provision of documentation from JHCM. The questions on the Form are all related to JHCM and not an individual.
- [23] Exhibit “SZ 4” is a copy of Mr Hylton’s résumé stating among other things that he is the “Principal of a small firm offering a full range of construction management and general construction services.” This letter was written on the letter head of JHCM. Mrs Ruan is of the view that Mr Hylton was marketing himself on behalf of JHCM of which he is principal.
- [24] Exhibit “SZ 5” is a copy of the Web page of JHCM which makes reference to the special services for contract management provided for by JHCM as distinct from its architectural services provided for under Joe Hylton Architects.
- [25] Exhibit “SZ 6” is a copy of a letter dated March 4, 1999 from Mr Hylton to Mr Rizzuto written on the letter head of JHCM. In that letter Mr Hylton outlined, what his role in the project would be, among other things.
- [26] In seeking to further show that ADC intended to contract with JHCM and not Mr Hylton, Mrs Ruan pointed out that the payment records indicate that payments were made to JHCM and not Mr Hylton in his personal capacity. This, she opines reaffirms that ADC intended to contract with JHCM.
- [27] Next, Mrs Ruan referred to certain correspondence from Mr Hylton to Mr Mario Halley., ADC’s accountant.

- [28] Mrs Ruan then went on to discuss the control test submitting that Mr Hylton had control of most of the activities that an ordinary employee would not. He laid out the work to be done, how it ought to have been done and the time when it ought to have been done, submitted Mrs Ruan.
- [29] To support her submissions, Mrs Ruan referred to the case of *Young v Woods Ltd v West* IRLR 201; which discusses, among other things the distinction between a contract for service and a contract of service.
- [30] Reliance was also placed on *Market Investigations v Minister of Social Security* [1969] 2 QB, 173 wherein the Privy Council discussed all the indicia which point to the status of an employee rather than an independent contractor.
- [31] It is of interest that during the hearing, Mrs Ruan revealed that there was no written contract. There was an oral agreement, she said. In light of this fact, she asks the court to infer the contract from the entire course of dealings, including the letters exchanged between the parties in relation to the project.
- [32] As to the power of the court to substitute or remove a party, Mrs Ruan referred the court to the provisions of CPR 19.3 (1) which provides that the court may add, substitute or remove a party on or without an application. According to Mrs Ruan "It is upon this basis that the Defendants respectfully submit that the Claimant was not employed as an employee in his personal capacity and ought to be substituted with Joe Hylton Construction Managers Inc."
- [33] At this point during the hearing, the court raised with Mrs Ruan whether CPR 19.3 (4) adversely affects her application. Mrs Ruan's response was that rule 19.3 (4) seems to suggest that the Applicants/Defendants would require the written consent of JHCM. Nevertheless, submitted Mrs Ruan, the court has wide powers under CPR 26.1. So if the court is not persuaded that the application for substitution has not been properly brought before the court, then the Applicants/Defendants say that it is an abuse of process for Mr Hylton to have brought the claim, contended Mrs Ruan.
- [34] Mrs Ruan then repeated her contention that the court should have regard to CPR19.3 (1) which allows it to substitute a party. If Mr Hylton continues as the Claimant, this will present a difficulty for the court, submitted Mrs Ruan. The court was not told what difficulty was envisaged. In concluding her submissions, Mrs Ruan reemphasized her previous submission that Mr Hylton had no personal dealings with ADC and ought to be removed.
- [35] In her responding submissions on behalf of Mr Hylton, Ms Bernard posited that the application to remove Mr Hylton as a Claimant is premature in view of the fact that the pleadings have not yet been closed, and the application is made prior to there being a case management conference.

- [36] Ms Bernard further submitted that Mr Hylton's case ought to be examined on its merits in order to determine the relationship which existed between the parties to the claim. She further submitted that there is sufficient evidence before the court to show that Mr Hylton has a good arguable case and ought to be given the opportunity to present his case in full. It was Ms Bernard's further submission that the substitution of Mr Hylton would be fatal to his case, since his case concerns the employer/employee relationship.
- [37] In seeking to develop that point, Ms Bernard quoted Section 1 of the Fair Labour Standards Act R.S.A. c. F 15 which defines the term "employee". After quoting that Section, Ms Bernard submitted that an order substituting JHCM for Mr Hylton would have the effect of striking out Mr Hylton's claim without affording him the opportunity to present his case to show that he was an employee of JHCM.
- [38]. Ms Bernard then referred the Court to the provisions of CPR 19.2 (5) adding that the Applicants/Defendants have failed to show the court that the matters in dispute can be more effectively resolved by JHCM – the proposed Claimant. Furthermore, argued Ms Bernard, the Applicants/Defendants have not put before the court any evidence that Mr Hylton's interest or liability has passed to JHCM.
- [39] During the hearing, Ms Bernard submitted that the Applicants/Defendants applied for substitution. They have not obtained the written consent of JHCM. She then referred to paragraph 8 of the Affidavit of Mr Hylton filed 11th October 2011, and the bundle of documents exhibited thereto. Those documents are collectively marked exhibit "JP 1". They consist of a copy of a work permit, business card and a letter from Mr Richard Margulies – Vice President and General Counsel to ADC. So far as Ms Bernard is concerned, those documents evidence a contract of employment of Mr Hylton. Counsel next pointed to paragraph 5 of Mr Hylton's affidavit filed on 11th October 2011 wherein he deposed that the only role JHCM played in the relationship between him and the Applicants/Defendants is that his salary cheque was written in the name of JHCM. This, he says, was based on stipulations by the Applicants/Defendants.
- [40] Ms Bernard concluded her submissions by urging the court not to accede to the Applicants/Defendants application for substitution, but to allow the issues in dispute to proceed to trial on the totality of the evidence.

Court's analysis and decision

- [41] It will be apparent that the Applicants/Defendants application for substitution is based on two limbs (1) CPR 19.3 which deals with substitution of parties; and (2) the question whether Mr Hylton was an employee of ADC so as to warrant his continuation or substitution as a Claimant in this matter.
- [42] As to the first limb: The power to substitute or remove a party is conferred by CPR 19.3 which provides:

“(1) The court may add, substitute or remove a party on or without an application.

- (2) An application for permission to add, substitute or remove a party may be made by –
- (a) an existing party; or
 - (b) a person who wishes to become a party.
- (3) An application under 19.2 (5) 5 (substitution of a new party where the existing party's interest or liability has passed) may be made without notice but must be supported by evidence on affidavit;
- (4) A person may not be added or substituted as a claimant unless that person's written consent is filed with the court office.

(5 to 7) ... “

[43] I can readily dispose of the first limb since there is no evidence upon which I can make a finding that JHCM has consented to be substituted for Mr Hylton. That ground therefore fails. Nor is there any evidence upon which I can make a finding that the matters in dispute can be more effectively resolved by JHMC – the proposed Claimant. That ground also fails.

[44] The court does not agree with Mrs Ruan that it should consider striking out the claim as an abuse of process. There is no application to strike out the Claim, although the effect of an order to substitute JHCM for Mr. Hylton would be to strike out Mr Hylton's claim in its infancy. CPR 26.2 (2) sets out what the court should do if it proposes to make an order of its own initiative. The court is required to give any party likely to be affected a reasonable opportunity to make representations. That having been said, I do not propose to make an order of my own initiative. I hasten to add that even if an application to strike out the Claimant's Claim were to be made, the court would be required to take the primary facts as true.

[45] The court is not required to take the draconian step of striking out a matter unless the Claimant's claim is incurably bad. This would deprive parties of their rights to a fair trial, and the ability to strengthen their case through process of disclosure and other court processes such as requests for information, and the cross examination of witnesses which often change the complexion of a case. (See *Citco Global Custody NV v Y2K Finance*, BVI Civil Appeal No 22 of 2009).

[46] As to the second limb: I can also readily dispose of it by simply referring to the passage in *Young and Woods v West*, supra cited by Mrs Ruan herself:

“[I]t is by now well settled that the label on which the parties choose to describe their relationship cannot alter or decide their true relationship; but, in deciding what

the relationship is, the expression by them of their true intention is relevant but not conclusive. Its importance may vary according to the facts of the case.”

- [47] Similarly, I can simply refer to *Leting Sang v Chung CHI – Keung and Another*, Privy Council Appeal (1990) 2 AC 374, where Lord Griffiths, in commenting on the Court of Appeal’s decision in *Market Investigations v Minister of Social Security* [1969] 2 QB 173 stated that the Court of Appeal was right to hold that “the classification of each case of this nature depended very much on its own facts; they were right to rely on the dictum of Cook J in *Market Investigations v Minister of Social Security*, 184-185, and to emphasize that no exhaustive list could be compiled of the considerations which were relevant in determining the question whether the contract was a contract for services or a contract of services. Nor could strict rules be laid down as to the relative weight which the various considerations should carry in particular cases; they were right to look at the totality of the evidence; they were right in their approach to consideration of the facts...”
- [48] Later, Lord Griffiths continued, “it must now be taken to be firmly established that the question of whether or not the work was performed in the capacity of an employee or of an independent contractor is to be regarded by an appellate court as a question of fact to be determined by the trial court.”
- [49] As can be seen, the authorities suggest that this is not a matter for the master but a matter for the trial judge. The true nature of the relationship between the parties must be determined at trial.
- [50] With regard to the Fair Labour Standards Act R.S.A. c. F 15 referred to by Ms Bernard, this Act would have to be construed to determine whether the definition of “employee” is extended to a person of Mr Hylton’s calibre. How this Act is interpreted is a matter for the trial judge.
- [51] Ultimately, as the contract is unwritten, it is obvious that the relationship between the parties will depend heavily on the construction and interpretation of correspondence passed between the parties; on other written documents such as those exhibited to affidavits by both sides; witness statements; oral examination of the parties of the parties concerned. How the documents are interpreted is a question of fact for the tribunal of fact (*Leting Sang v Chung CHI – Keung and Another*, Privy Council Appeal (1990) 2 AC 374).

Conclusion on the application for substitution

- [52] The court is not minded to substitute JHCM as Claimant for Joseph Hylton in accordance with CPR 19.3 as there is no evidence before the court which supports a finding that JHCM has consented to being removed as a Claimant. Also, the court is not minded to treat the application for substitution as an application to strike out the claim as an abuse of process as Ms Ruan has asked me to do. To do so, without an application would have the effect of striking out Mr Hylton’s claim in its infancy without affording him an opportunity of making representations in accordance with CPR 26.2 (5). It will also have the effect of

depriving Mr Hylton of the opportunity of strengthening his case in accordance with relevant court procedures.

[53] As to the nature of the relationship between the parties, the authorities say that this is a question of fact to be determined by the trial court. Relationship is a matter of intention. There is a dispute among the parties as to this issue.

[54] Although a picture emerges in my mind, I must resist the temptation to preempt a determination on the issues which are for the sole consideration of the trial judge. Suffice it to say, that given the nature of the case, and having regard to the learning contained in the relevant authorities, I conclude that the appropriate approach would be to refuse to accede to the application for substitution and cause the matter to be set down for first case management conference.

The application for security for costs

[55] The application for security for costs was adjourned pending the outcome of the application for substitution. No oral submissions were made in relation to security for costs. Written submissions have been filed by both sides and are before me. However, I do not think it will be prudent for me to consider the application for security for costs as Mrs Ruan indicated that she intended to object to Mr Hylton's filing and short service of his Second Affidavit filed on October 31, 2011, without leave of the court, and without affording the Applicants/Defendants sufficient time to respond thereto.

THE ORDER

[56] It is hereby ordered that:

- [1] The application by the Applicants/Defendants to remove Leandro Rizzuto as a Defendant is granted.
- [2] The application by the Applicants/Defendants to substitute JHCM for Joseph Hylton is refused.
- [3] The court office shall set the matter down for first case management conference soonest, at which time the application for security for costs shall be heard.
- [4] Success was divided so there shall be no order as to costs.

[57] Notwithstanding this order, I would wish to state I am of the view that this matter is a good candidate for mediation. So I would invite the parties to attempt to resolve their dispute in a non litigious manner by way of mediation.

Pearletta E. Lanns
Master