

IN THE SUPREME COURT OF BELIZE, A. D. 2016

CLAIM NO. 49 OF 2016

(CINDY LOPEZ-LINAREZ

CLAIMANT

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BETWEEN (AND

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(ROBERT'S GROVE LTD.

DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mr. Michel Chebat, SC, of Chebat & Co. on behalf of the Claimant

Ms. Iliana Swift of Courtenay Coye LLP on behalf of the Defendant

D E C I S I O N

1. This is an Application for Summary Judgment and striking out of the Defence brought by the Claimant. The Claimant was formerly employed as General Manager of the Defendant Company and has been working there since September 2001. The Defendant is a limited liability company which carries on business as a hotel and tour company in the village of Seine Bight, Stann Creek District, Belize. The substantive claim is one seeking

damages against the Defendant for breach of contract and wrongful termination and in the alternative constructive dismissal. The Defendant had failed to comply with case management order dated May 31st, 2016 and later applied for relief from sanctions and sought an extension of time within which to file witness statements, citing difficulty in locating its relevant documents as the reason for its failure to comply. The court was not satisfied with the reason for non-compliance and therefore refused to grant the extension of time. The present application is for striking out of the Defence, and for summary judgment where the Claimant says that the Defence is without merit and the Defendant has no real prospect of succeeding at trial since there are no witness statements to substantiate the Defence. The Defendant resists the application, arguing that even where there are no witness statements to support the case for the Defence, the matter should still be allowed to proceed to a full trial so that the evidence of the Claimant can be subjected to cross-examination.

The court now decides the matter.

Legal Submissions by The Claimant In Support of Application for Summary

Judgment

2. Mr. Chebat, SC, submits that the court is empowered by Rule 15.2 of the Civil Procedure Rules to give summary judgment on a claim if it considers that a Defendant has no real prospect of succeeding on a claim. Rule 26.3 also gives the court power to strike out whole or part of a statement of case if it discloses no reasonable ground for defending the claim. As the Defendant in this matter failed to file witness statements in compliance with the Case Management Order and it has been refused an extension of time to file such statements, there is no evidence upon which the Defendant can establish the matters alleged in the Defence. He also refers to the written contract of employment Exhibit "CL1" between the Claimant and the Defendant Company signed on February 25th, 2013 which sets out the Claimant's duties and responsibilities as General Manager. The contract also speaks to Mrs. Lopez-Linarez's compensation as a base annual Salary as \$52,000 per year subject to a ten percent increase per annum for each consecutive year of employment. The contract also states that the period of the Claimant's employment as General Manager of the Defendant Company shall be for a period of seven (7) years commencing from the date

of the contract. The Claimant acted as General Manager of Robert's Grove Ltd. from the 25th February, 2013 up until November 2015. She was paid accordingly and regarded by the world at large as General Manager of the Defendant, the Defendant accepted and allowed her to act in that capacity so the Defendant is now barred from denying that she was the General Manager. Then suddenly on October 28th, 2015 Mrs. Lopez-Linarez along with other members of the Defendant's Accounting staff received an email from Boris Mansfield informing that "*no more issuing of checks, loans, petty cash payments ... and any matters that involve sending money or creating financial obligations to RG unless approved by him, the Trust or Michael Kramer*". After this period when Mansfield and Kramer took over Robert's Grove, the Claimant says nothing remained the same. The Defendant brought in 'Trust Central America' on or about October 10th while Mrs. Linarez was out on a staff trip and one Mr. Dan Olson introduced himself to vendors and staff as the new General Manager. When the Claimant approached Mr. Kramer about this, he told her that they were only at the hotel to see how things were being done and to help them improve the standard of the hotel if necessary. When Mrs. Linarez went on vacation on November 14th, 2015 a number of employees of Robert's Grove kept

contacting her and asking what was happening as a lot of changes were being made and she was being told she was no longer the General Manager. She felt disrespected and lied to and as a result on 6th November 2015 she wrote to Michael Kramer and Dan Olson demanding her termination letter (Exhibit "CLL 3"). On November 10th, Mrs. Linarez received an email from one Andre Niederhauser in which he provided a new organizational chart for the Company and in which Mrs. Linarez was no longer General Manager as per her agreement. Her post was now described as "*Executive Asset Manager*". The Claimant says that she was never consulted in relation to this new position nor did she at any time agree to be an "*Executive Asset Manager*". Upon her return to work, she found that she no longer had access to her email, Quick Books and room master. After she spoke to Mr. Kramer about this he called IT personnel and they came and set up new accounts and her email address was changed. Dan Olson was receiving her emails and in order for her to access Quick Books she had to contact Peggy Azore in the Miami Office to obtain access. Despite these changes, Mr. Kramer kept telling the Claimant that she was still the General Manager but clearly this was not so. In response to her request, she was advised by Andre Niederhauser in email dated November 15th, 2015 that

she was “to follow the instructions of Peggy Azore, Financial Controller” Exhibit “CLL 5”. On November 16th, 2015 she responded to that letter and told Mr. Niederhauser that his instructions to her was in breach of her employment contract and that she considers herself as having been dismissed from her employment. On November 17th, 2015 she received a letter from Kramer and Mansfield saying they were unaware of her contract and asking her to produce a copy. She sent a copy to them after which she received letters saying that she had abandoned her job; by that time the Claimant had already informed the company in her letter dated November 16th, 2015 that she considered herself as having been dismissed.

3. Mr. Chebat, SC, contends that this is a case where the Applicant/Claimant was employed as the General Manager of this hotel with very broad, very specific and very comprehensive duties, and the Defendant Company suddenly and without any consultation with her and without any agreement with her, unilaterally changed her contract. He relies on Claim No. 142 of 2013 ***Zoe Roberson Zetina v. Galen University Ltd***, where the Belize Supreme Court dealt with similar issues of wrongful dismissal, constructive dismissal and the principles that the court should follow. At page 26 paragraph 127 of the judgment, Abel J. says:

“The principle of constructive dismissal has been authoritatively expressed as ‘the contract test’ by Lord Denning in the English Court of Appeal case of Western Excavating (E.C.C.) Ltd. v. Sharp where he stated: ‘If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant, without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: For, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.’”

Mr. Chebat, SC, argues that the broad powers and duties given to Mrs. Lopez Linarez under her contract as General Manager of Robert’s Grove were suddenly taken away by the unilateral actions of the Defendant Company. Her position was changed to that of “Executive Asset Manager” without any discussion with her and without her consent, and with no

definition of what that position entailed. He contends that those actions constitute a breach of the Claimant's employment contract which was fixed for seven years. In addition, there is no prospect that the Defence will succeed since there is no evidence to substantiate their defence. He describes the Defence as a very "*bare-bones*" defence. The Defendant Company does not deny that the Applicant/Claimant was its General Manager. The Defendant Company also states that it was unaware of Mrs. Lopez-Linarez's contract. Learned Counsel points out that the Defence is dated March 8th, 2016 and paragraph 30 of the Claimant's affidavit filed in support of this application to strike out Defence shows that a copy of the Claimant's contract was sent to the Defendant company on December 7th, 2015. The Defence further states that while the email stated that the Claimant's job title would change, it was never indicated that her duties or remuneration would be altered. Mr. Chebat SC argues that Robert's Grove never said what the duties of Mrs. Lopez-Linarez as "*Executive Asset Manager*" were. He says that what was evident was that the duties she had and the duties which she previously carried out as General Manager under her written contract were now assigned to another person. He further argues that, although the Defence alleges that the Claimant had proved

inept at maintaining the financial records of the company, there is no evidence to support that allegation. He contends that the Claimant has been working for the Defendant Company since 2001 for a period of almost 15 years in total, and there is not an iota of evidence that the Defendant ever had concerns or challenged her ability to carry out her duties. He therefore asks for summary judgment to be granted in favor of the Applicant/Claimant, and for the Defence to be struck out.

Legal Submissions on behalf of the Respondent/Defendant opposing the Application for Summary Judgment

4. Ms. Iliana Swift on behalf of the Respondent/Defendant submits that this is a matter that should proceed to full trial, where the Defendant Company will be given the opportunity to cross-examine the witnesses for the Claimant. She says that it is not unusual for a matter to proceed where there is no witness statement on behalf of the defence. She relies on two cases to buttress her arguments. In ***John Rahael v. TNT News Centre Ltd.*** both sides failed to file witness statements and the Trinidad and Tobago Supreme Court refused to give both sides extension of time and decided to proceed just on the pleadings and Agreed Statement of Facts and Issues. And in ***The Proprietors of Strata Plan No. 49 v. Munteer Investments Ltd.***,

the Defendant did not file any witness statement and the matter proceeded to trial in this very court where the case was determined on the facts presented by the Claimant and the applicable law. The Defendant successfully defended the claim in the latter case.

Ms. Swift contends that the facts presented by the Claimant are sufficient to enable the court to determine whether or not the Claimant was wrongfully terminated or constructively dismissed. While the Claimant presents a very positive picture of her position in her affidavit in support of this application, the emails attached to her affidavit as exhibits paint a very different picture and the Defendant Company wants to test that evidence on cross-examination. Learned Counsel refers the court to Exhibit "CLL 4" where reference is made to the following:

"Proper accounting is the baseline for a successful business. Fortunately, we have corporate resources. The accounting due to its poor present state will have to be overseeing the accounting until we are able to see the resort accounting processes implemented fully. Cindy will be coordinating the process directly with Regional Corporate."

Ms. Swift also refers to Exhibit "CLL 7" email dated November 17th, 2015 where the Directors of Robert's Grove, Michael Kramer and Boris Mansfield

informed Mrs. Lopez-Linarez that they are unaware of her written employment contract with the Defendant Company and ask for a copy for them to review. They also state that at no time was she advised that she is no longer employed at Robert's Grove and at no time was there any discussion about any change to her salary. The only discussion was asking her to assist Trust Hospitality in getting the company's accounting books in order. The email ends by saying that Mrs. Lopez-Linarez is gainfully employed by Robert's Grove and has never been advised any different and that the company expects that she will do her job. Ms. Swift also points out that it was not until December 7th, 2015 that the Claimant's contract was forwarded to the Directors via email. There is also a letter dated November 20th, 2015 where the Directors remind Mrs. Lopez-Linarez that she has a job at Robert's Grove and specific tasks to complete. They end by issuing a warning that this is a written warning for being absent without cause and asking that she show up to work and complete the tasks assigned.

Ms. Swift contends that these emails show that Mrs. Lopez-Linarez was not showing up for work and that this evidence should be tested on cross-examination to assist the court in determining live issues. She relies on two cases. In Claim No. CV2009-02286 *Hosang v. Baggy*, Pemberton J. in the

Trinidad and Tobago High Court refused to grant summary judgment saying
“where there is a real prospect of oral evidence affecting any assessment of the facts of this case. Therefore, given that the first two requirements have not been met, summary judgment on this application would be premature”.

In CCJ Appeal No. CV 003 of 2012 BB Civil Appeal No. 2 of 2006 **Sandy Lane Hotel v. Brigitte Laurayne**, the CCJ overturned the Court of Appeal decision on a case of constructive dismissal. The Respondent was a Director of Leisure and Spa at Sandy Lane Hotel and an Assistant Director was employed to assist her in some of her duties. She claimed that this was constructive dismissal because it was a substantial change in the status of her employment and the duties of her employment. The Court of Appeal had agreed that it was constructive dismissal but on appeal to the CCJ that decision was overruled. At paragraph 22 the CCJ held:

“Despite Mrs. Laurayne’s odd perception of the situation, we have no doubt that there was no substantial removal of part of her job as Director of Leisure And Spa so as to strike at the root of her contract and enable her to consider herself constructively dismissed. Upon appointment of the intended specialist in spa treatments as Assistant Director responsible for the ‘hands on’ day-to-day running of the massage and beauty treatment part of the Spa, Mrs. Laurayne continuing as Director of Leisure and Spa, would remain responsible

for the spa budget, spa policy, attending meetings as a Level 1 head of department, recruiting employees and the efficient running of the massage and beauty treatments directly dealt with by the new Assistant Director. The latter would have been reporting directly to Mrs. Laurayne, who reported to the General Manager. This would reflect the established position for Leisure (where Mrs. Laurayne as Director was assisted by an Assistant Director). Apart from the useful 'hands on' assistance to be provided by the new Assistant Director, counterbalanced by Mrs. Laurayne's responsibility for such person's performance of the relevant duties, Mrs. Laurayne's position, title, other duties, responsibilities, role, salary and benefits and place of work all remained the same. Her status could be said to be enhanced by having another Level 2 employee responsible to her."

The CCJ later cites dicta from Warner J in ***Mackinnon v. Acadia University*** in interpreting contractual terms and implied terms as follows:

"It is normal and logical that in any institution, private or public, profit or nonprofit, the handful of top administrators are expected to be generalists and more flexible in their contribution to their institution; said differently, those in leadership positions are expected to contribute to the big picture as part of a team to ensure the success of the institution, and with that comes a comparative responsibility to respond in a flexible manner in their job. Flexibility in

job functions, provided the employee has the appropriate skill sets, is an implied term in the employment of a senior employee.”

Ms. Swift argues that while it is accepted that the Claimant was the General Manager, the Claimant took no steps or did not allow the Defendant to have any discussions as to what the new job title may or may not entail. The Defendant Company says that it is not sufficient for the Claimant to say that her job title has been changed and therefore she is not coming back to work because she has been constructively dismissed. There must be some substantial change in her terms of employment; a change in job title is not substantial. The application for summary judgment should be dismissed.

Submissions in Reply

5. Mr. Chebat, SC, in his brief rebuttal to Ms. Swift’s arguments states that if it were only a change of job title there would be no case, but the evidence shows that there were significant and substantial changes to Mrs. Lopez-Linarez employment. She was no longer in charge of accounting. She had to refer to one Peggy Azore. Her emails in relation to the business of the company were no longer received by her. They were received by somebody else. They introduced into the company somebody else who the employees now regarded as the General Manager. The Claimant repeatedly asked the

Defendant what does this new job title entail, nothing was forthcoming. Mr. Chebat, SC, argues that the evidence is contrary to Ms. Swift's contention that the Claimant did not give the Defendant an opportunity to respond or discuss. He also says that the emails between the Claimant and the Defendant Company exhibited to Mrs. Lopez-Linarez's affidavit to which Ms. Swift has referred the court were exchanged after the Claimant told the Defendant *"That's it. I consider myself to be constructively dismissed"*. This was more than a month after Mrs. Lopez-Linarez had been communicating with the Defendant Company saying *"Tell me what this new job entails, tell me what this new job description is"*. So Mr. Chebat, SC, submits that there was a substantial change in the written contract and this Applicant/Claimant did not agree to any changes in her employment contract.

In conclusion, Mr. Chebat, SC, says that Exhibit "CL4" refers to accounting but that the evidence does not bear out the allegation made in the Defence that the Claimant was inept. The person that the Defence say was inept is the very person whom they are saying they want to coordinate the accounting process that they want to correct. The assertion in the Defence

that Mrs. Linares is inept is contrary to the Defendant's own email. The Application for summary judgment should be granted.

Decision

6. I wish to thank both Counsel for your legal submissions which have greatly assisted the court in determining this matter. The application is made pursuant to the Civil Procedure Rules of Belize, Rule 15.2 and Rule 26.3.

15.2 "The court may give summary judgment on the claim or on a particular issue if it considers that -

(a) the claimant has no real prospect of success on the claim or the issue; or

(b) the defendant has no real prospect of successfully defending the claim or the issue."

CPR 26.3 (1) (c) expressly gives the court the power to strike out the whole or part of a statement of case if it discloses no reasonable ground for defending the claim.

It is important to assess the terms and conditions of employment set out in the contract and as the contract is quite short, I now set out the contract in its entirety.

“EMPLOYMENT AGREEMENT

This agreement, effective on February 25th, 2013, is between Roberts Grove, Limited (hereinafter referred to as ‘the Company’) and Cindy Lopez-Linarez JP (hereinafter referred to as ‘the Manager’).

WHEREBY IT IS AGREED as follows:

POSITION AND RESPONSIBILITIES:

Position: General Manager

Responsibilities: The General Manager shall be responsible for the following:

- Managing all of the hotel’s departments such as maintenance, front office, housekeeping, food and beverage, sales, etc.
- Recruiting, employing, training, supervising and terminating employees
- Establishing prices and terms for hotel services
- Arranging and providing for public relations, advertising and marketing
- Planning, purchasing and supervising capital expenditures (e.g. furniture, fixtures and equipment)
- Preparing monthly and annual financial statements and daily reports for the Managing Director
- Purchasing supplies and entering into contracts and making payments for those services
- Operating the hotel in accordance with the approved annual budget and the terms of the management agreement
- Adhering to service and product standards required by any affiliation or brand

COMPENSATION:

Base Annual Salary	BZE \$52,000.00 per Annum. Base Annual Salary shall be subject to a ten percent increase per annum for each consecutive year of employment.
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Taxes All taxes shall be paid by the Company in addition to the Base Annual Salary.

Service Charges Shall be payable to the General Manager, based on the Company Policy.

TERM: Roberts Grove, Limited shall employ the Manager to render service to Authority in the position and with the duties and responsibilities of GENERAL MANAGER, commencing on the date first written above and continuing for a period of seven (7) years.

IN WITNESS WHEREOF the Company and the Manager have hereunto set their hands and seals on the day and year first above written.

By the Company:

SIGNED SEALED AND DELIVERED)
by the above-named) _____
in the presence of) Managing Director
)

Witness

By the Manager:

SIGNED SEALED AND DELIVERED)
By the above-named) _____
In the presence of) Cindy Lopez-Linarez
)

Witness''

Having considered the arguments for and against this application to strike out the Defence and grant summary judgment in this matter I find myself persuaded by the cogent arguments of Mr. Chebat, SC, on behalf of the Claimant. It is quite clear from the evidence in this matter that this was not merely a change of the Claimant's job title, without more. The facts as revealed in the email exchanges between the parties and the new organizational chart sent by the Defendant to the Claimant amounted to a substantial change in the terms of the Claimant's written contract where her authority as General Manager was taken away and replaced with the nebulous title "*Executive Asset Manager*". Under her written contract she was clearly the hotel's chief accounting officer, responsible *inter alia* for planning, purchasing and supervising capital expenditures (e.g. furniture, fixtures and equipment) and preparing monthly and annual financial statements and daily reports for the Managing Director, operating the hotel in accordance with the approved annual budget and the terms of the management agreement. To deviate from that contractual position and tell the Claimant in the email dated 15th November, 2015 that her duties were now "*to follow the instructions by our Financial Controller Peggy Azore*" clearly amounts to a material change which signifies a diminution of her

duties and powers as expressed in her written contract, and a derogation in the regard that the company previously demonstrated toward the Claimant as its General Manager. I also agree with Mr. Chebat SC's observation that the Defendant refused to define the terms of the new post assigned to the Claimant as "*Executive Asset Manager*" even after the Claimant asked repeatedly for the post to be defined as proven by her emails to the company over the course of a month. The tone and content of the letters of November 20th, 2016 and November 24th, 2016 sent to the Claimant by the Defendant show no regard for the written contract between the Claimant and the Defendant nor any intention to honour the terms of such contract even after the Directors were made aware of the existence of the contract on November 17th, 2015. It therefore lies ill in the mouth of the Defendant to now say to the court that it did not have the opportunity to discuss or negotiate with the Claimant because she absented herself from work without cause. When this is viewed against the factual background that the Claimant was an employee of almost 15 years standing, and her loyalty to the Defendant Company was also acknowledged by the Directors in email dated November 16th, 2015, I see no way that the Defence which was in my respectful view lacking in substance and aptly described by Mr. Chebat,

SC, as “bare-bones” can succeed. The Defence is struck out. I therefore grant the application for summary judgment as prayed. Costs of this application and of the substantive claim awarded to the Claimant to be agreed or assessed.

Dated this Friday, 15th day of December, 2017

**Michelle Arana
Supreme Court Judge**