

IN THE SUPREME COURT OF BELIZE, A. D. 2011

CLAIM NO. 19 OF 2011

(A. L. CONSTRUCTION LTD. CLAIMANT
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BETWEEN (AND
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(MAYA RIO DEVELOPMENT LTD. DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mr. Nicholas V. Dujon, SC, for the Claimant

Mr. Kareem Musa of Musa and Balderamos for the Defendant

J U D G M E N T

1. This is a claim for the sum of \$43,342.68 as payment together with interest at the rate of 2% per month for works done and materials supplied to the Defendant company by the Claimant Company between the period 11th November, 2008 and 13th July, 2009.

The Facts

2. The Claimant is a limited liability company engaged *inter alia* in the construction of buildings and the supply of building materials in the Placencia area of Stann Creek District. Between the months of November 2008 and July 2009 the Claimant alleges that it delivered quantities of various building materials to the Defendant Company. In response, the Defendant Company states that it did not during the period stated by the Claimant receive any building materials from the Claimant, and therefore it does not owe the Claimant the sum claimed or any other sum.

The Issue

3. Does Maya Rio Development Ltd. owe A. L. Construction Ltd. the sum of \$43,342.68 or any other sum for building materials supplied to the Defendant Company between November 2008 and July 2009?

Claimant's Evidence

4. At trial, the Claimant called two witnesses. Mr. Klaas Loewen, Director of A. L. Construction Ltd testified that he has been an owner and director of the Claimant Company for seven years. His brother Albert Loewen is another owner and director of the company. In his witness statement he stated that his

company provided numerous deliveries to the Defendant Company which refused to pay for them. He said that Marco Caruso is the owner and director of the Placencia Hotel and Maya Rio Development Ltd and both these sites were Maya Rio controlled when it came to real estate development by Marco Caruso. He said that most orders would be placed by Ron Oskowski who was in charge of ordering for Maya Rio. Mr. Oskowski was in charge of ordering for Maya Rio in the past and the invoices had been paid. Mr. Loewen also stated that Mr. Oskowski would approve invoices for the Claimant Company for payment by the accountant for Maya Rio. He described a process where whenever A. L. Construction Co. Ltd. would send out material it would issue the truck driver who made the deliveries with a waybill to be signed by the person who would accept the materials. The originals would be kept by the customer and copies would be returned to Mr. Loewen by the truck driver. He said he called Mr. Caruso after waiting three months for payment of unpaid invoices and that Caruso just swore at him and refused to pay. He attached as exhibits several waybills and invoices for materials which he claims were delivered to the Defendant company and which were signed on behalf of that company by Willie Pate and Ron Oskowski.

Mr. Loewen was cross examined extensively by Mr. Musa for the Defense. Under cross examination, the witness admitted that Marco Caruso has never placed any orders with him personally. He never had discussions with Mr. Caruso about business but with persons who he believed to be Caruso's managers. He said he was not aware that Maya Rio did not own any property on the other side of the hotel or that that property was owned by Mayan Lagoon Estates Ltd. He said that he did not know that Maya Rio only owned the hotel and not the residential community development beside the hotel. He admitted that his company delivered materials not to the hotel owned by Maya Rio but to property beside the hotel. He stated that orders had been placed and paid for in the past by Maya Rio Development Ltd. not by Maya Rio Construction, and that A. L. Construction had delivered materials to Ron Oskowski and Willie Pate for and on behalf of Maya Rio Construction, not Maya Rio Development Ltd. He admitted that he did not know that Mr. Oskowski was not employed by the Defendant Company, and that Mr. Oskowski told him he was going to give the invoices to Marco Caruso so that the Claimant could be paid. He said he did not know whether Mr. Oskowski was a sub contractor and he could not prove that Mr. Oskowski worked for Mr. Caruso or for the Defendant Company.

He also has no proof of any agreement to supply materials to Marco Caruso or the Defendant Company. When asked specifically about the waybills he had put before the court he said he could not say who the persons were who signed the waybills and what relation those persons were to the Defendant company because his driver was the one delivering supplies and had the waybills signed.

He was re-examined and again he stated that the materials were delivered to a residential area by the lagoon. He said the invoices were delivered to one "Donald" who never gave any indication that they were being delivered to the wrong company. He does not know Donald's last name.

5. The next witness for the Claimant was Domingo Duvon. He said that he is a truck driver and that he worked for the Claimant Company between July 2007 and October 2010. He said that he would drive his truck and deliver materials to Maya Rio, and he would present the waybill to someone who would sign to say they received the supplies. He tendered waybills which he had signed.

6. Under cross examination Mr. Duvon stated that he did not deliver materials to the hotel. He delivered materials to residences near the lagoon. He was asked who signed the waybills and he said somebody who worked for Del Rio but he didn't know their names. He was shown a waybill with the name Ron Oskowski on it and asked to look at it and say who signed it. He replied that he did not know who received the material and he does not recognize the signature. He was also asked about a waybill with the name Willie Pate on it and he said could not say whose signature was on it. All Mr. Duvon could do was identify his own signature on the waybills.

Defendant's Evidence

7. There were three witnesses called on behalf of the Defense. The first was Marco Caruso who said in his witness statement that he is the Managing Director and part owner of the Defendant Company. He stated that Maya Rio Development Ltd is a developer and owner of condominium units along the Placencia Peninsula, Stann Creek District, Belize. He said he did not at any time as Managing Director of the Defendant Company, nor did any other officer of his company request the Claimant Company to carry out any works or supply materials to the Defendant Company between 11th November, 2008 to July 2009 as alleged. Mr. Caruso also said that the

invoices are billed to “Maya Rio Construction” and not to Maya Rio Development Ltd the Defendant Company. He also said he never authorized any “Donald” or “Kus C” to place any orders for the Defendant Company with the Claimant Company. He said that Ron Oskowski is an independent contractor who works with him and shares ownership of another company with him called Maya Lagoon Estates Ltd. He says Willy Pate is an employee of the Defendant Company but that Mr. Pate was never authorized to order materials on behalf of the company.

8. Mr. Caruso was cross examined extensively by Mr. Dujon, SC, on behalf of the Claimant Company. He admitted that he is an owner and director of both Maya Lagoon Estates Ltd. and Maya Rio Development Ltd. He said that he did use the Defendant Company to deliver materials to construct his hotel after 2006. He stated that the residential development by the lagoon is owned by Maya Lagoon Estates Ltd. He said he never maintained an office on the site of the residential development. He admitted that he knew one “Donald Edwards” who was a sub contractor who owned his own company. He also admitted that he knew “Willie Pate” and that Mr. Pate was an employee of Mayan Lagoon Estates Ltd. as a Supervisor. Mr. Caruso was asked if in December 2008 there was any ongoing construction on the

lagoon side. He answered that there is always a continuous operation because they sell lots and build houses there. He admitted that the company which was in charge of that development was Mayan Lagoon Estates Ltd. He said in 2008 Mr. Ron Oskowski was working on that site as an independent contractor with his own separate company who ordered building supplies and materials under a sub-contract. He said that Mayan Lagoon Estates merely owned the land that the development was located. Construction of the houses was done by other companies/sub-contractors and he would pay those contractors for works/supplies. Mr. Caruso said he does not know who is Maya Rio Construction. He said in the past he had employed Albert Loewen as a sub contractor to do some cement work on a pool at the hotel at Maya Rio Development Ltd. and that he has signed some cheques for those works. He said he always paid promptly. That was from 2002 to 2007 when he stopped using their services and started using those of Ron Oskowski instead. Mr. Caruso said he specifically told Mr. Albert Loewen not to push any business with any of the projects involved with him unless specifically authorized by him or by the persons associated with him as employees. He denied having any discussion with anyone from the Claimant Company about unpaid bills. He said Willie Pate

worked for him on seven different projects going on at the same time between 2008 and 2010. He denied that he was a director of Ron Oskowski's company Romar Construction and said he was merely a shareholder.

9. The next witness for the Defence was Ron Oskowski. He said in his witness statement that he is an independent contractor working in Placencia, Stann Creek District. He is not an officer of the Defendant Company, nor is he a shareholder or manager. He said he was shown a waybill by Mr. Caruso showing his alleged signature order for building materials on behalf of the Defendant Company. He says he has never been authorized by the Defendant Company to place orders for materials. He also testified that the signature on the waybill shown to him is not his own.

10. Under cross examination by Mr. Dujon, SC, Mr. Oskowski said he has been living and working as a contractor in Belize since 2006. He said he has known Marco Caruso since 2005 when he came to Belize on holiday. The name of his company is Romar Construction and the shareholders and directors are Marco Caruso and Ron Oskowski. He said that in the latter part of 2008 he did not order materials from A. L. Construction; he used

another company Tiger Aggregates located outside Belmopan. He admitted that prior to that date he used to get materials from the Claimant Company but he stopped because he got their aggregate tested and it was too high in clay, causing problems with their concrete. He denied that the signature on the waybill shown to him was his signature.

11. The final witness called on behalf of the Defence was Willie Pate. He said that he is a Supervisor employed by the Defendant Company, and that he is not authorized to place orders and has never placed any orders on behalf of the Defendant Company. He said that the signatures on the two waybills shown to him are not his own.

12. Mr. Pate was cross examined by Mr. Dujon, SC, for the Claimant Company. He was asked which company of Mr. Caruso's did he work for and he said Mayan Lagoon. He admitted that he supervises other sites for Mr. Caruso such as those at Copal and the airport. He says that at the lagoon site he would supervise construction work, e.g., laying of tiles. Mr. Pate said he has seen Mr. Oskowski on the Maya Lagoon worksite dealing with machinery owned by Oskowski's company Romar Constructon. He said that as far as he knew, it was not Ron Oskowski who did construction on the Mayan

Lagoon site; it was Mayan Lagoon. He said whenever he needed building materials and supplies he would tell Mr. Caruso. He admitted that the Claimant Company used to deliver materials to various sites where he worked between 2005 and 2006. He said he didn't know who delivered building materials in 2008.

Legal Submissions

13. Mr. Dujon, SC, on behalf of the Claimant company urges this court to lift the corporate veil and find in favour of the Claimants. It is his submission that both witnesses for the Claimant Klaas Loewen and Domingo Duvon are witnesses of truth. He argues that based on the evidence there can be little or no doubt that materials were ordered and that materials were delivered to a site under the control of Messrs Caruso and/or Oskowski. He submits that cross examination of Caruso revealed that he is a principal in several companies which do business in the Placencia Peninsula. He argues that Maya Rio Construction should be treated as the alter ego of the Defendant Company and the corporate veil should be pierced, as to do otherwise would be inequitable. He has submitted an extract on "Groups of Companies" from **Mayson French and Ryan Company Law** 30th edition which discusses various cases on instances when the courts will pierce the

corporate veil such as *DHN Food Distributors Ltd. v. Tower Hamlets London Borough Council* [1976] 1WLR 852, *The Albazera* [1977] AC 774 and *Woolfson v. Strathclyde Regional Council* 1978 SC (III) 90.

Mr. Musa on behalf of the Defendant Company argues that this is a very basic claim that falls squarely within the principle of privity of contract. He points out that the Claimant should have instituted this claim either against Ron Oskowski personally or Ron's company Romar Construction. He emphasizes that both witnesses for the Claimant Company Mr. Loewen and Mr. Duvon testified that they delivered materials to the lagoon side of the Placencia Peninsula and that this evidence further confirms that it was not the Defendant Company which placed orders with the Claimant Company for the materials in the disputed invoices. He also points out that the invoices were made out to "Maya Rio Construction" which is not the Defendant Company.

Mr. Musa further submits that while it is not for the Defendant to establish that the orders were not made by Ron Oskowki (owner of Romar Construction) or by Willie Pate (employee of Mayan Lagoon Estates Ltd.), both witnesses have provided evidence to show that they did not place any

orders with the Claimant Company whether individually or on behalf of any other company. In addition, both witnesses state that the signatures alleged to be theirs on the waybills are not in fact their own. Mr. Musa also submits that to corroborate this evidence, the witness Domingo Duvon, truck driver for the Claimant Company, confirmed that he could not say whose signature was on any of the waybills.

Mr. Musa cites ***Chitty on Contracts*** 28th Edition Volume 1 at paragraph 19-022:

“The common law doctrine of privity of contract means, and means only, that a person cannot acquire rights, or be subjected to liabilities, arising under a contract to which he is not a party.”

At paragraph 19-004 of ***Chitty on Contracts***:

“Who are the parties? Normally the answer to this question is obvious enough: the parties to the agreement are the persons from whose communications with each other agreement has resulted.”

Mr. Musa argues that is clear from the evidence that there were no verbal or written communications between the Claimant and the Defendant in relation to any orders placed between November 2008 and July 2009. The Claimant alleges by its own evidence that it dealt with Ron Oskowski of Romar Construction who was carrying out development works at the instructions of Mayan Lagoon Estates Ltd. Mr. Musa therefore asks for the

claim to be dismissed with costs awarded to the Defendant Company. He also asks for costs for the interlocutory application to set aside the default judgment granted by the court on April 25th, 2013.

Ruling

14. I find the evidence of the Claimant in this matter to be “woefully inadequate.” There is not even a scintilla of evidence before this court that the Defendant Company Maya Rio Development Ltd. ordered anything from A. L. Construction Ltd. between November 2008 and July 2009. The claim appears to have been untenable *ab initio*, and was ripe for a striking out application had one been made. To my mind the state of the Claimants evidence is such that it is not fit for this court to even begin to consider lifting the corporate veil, as the basic ingredients of the claim have not been made out at all. He who avers must prove. Mr. Musa is correct in his submission that there is no privity of contract between Maya Rio Development Ltd. and A. L. Construction Ltd. The claim is dismissed forthwith.

15. Costs awarded to the Defendant Company in the sum of \$5,000.00 which includes costs of the interlocutory application for setting aside default judgment.

Dated this 4th day of November, 2014

Michelle Arana
Supreme Court Judge