

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
CIVIL SUIT NO. 317 OF 2016

SKY TRAVEL LTD:.....:PLAINTIFF

VERSUS

CHENG XING:.....:DEFENDANT

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The plaintiff filed this suit against the defendant a former employee for money had and received, fraud, and sought to recover from the defendant a liquidated sum of USD 76,861 and UGX 1,500,000 as special damages, general damages, and interest.

The defendant was employed by the plaintiff until 16th September 2014 as Operations Manager and her job description involved selling air tickets, collecting company debts and remitting collections to the plaintiff on a daily basis.

The plaintiff's system indicated that in a period between 1st March 2014 and 30th September, 2014 the defendant issued air tickets valued at \$82,128 to several plaintiff client's/customers and during her tenure and after employment with the plaintiff received monies from the several customers which she never remitted to the plaintiff.

The defendant after she ceased being an employee of the plaintiff continued invoicing the plaintiff's customers/clients for payment of the said issued tickets under M/s Friendship International Tours and Travel Ltd a company she incorporated as soon as she ceased being an employee of the plaintiff.

The defendant in her defence denied the allegations and contended that the suit was brought in bad faith and it is totally a witch hunt intended to harass,

humiliate and intimidate the defendant into dropping her intended suit for wrongful termination of employment.

The defendant denied being responsible for selling tickets or neither collection of company debts nor remission of money collections on behalf of the company. The selling of tickets or collection of debts, banking was done by accounts section which was supervised by Eddy Chou the plaintiff's director.

The suit initially proceeded interparty but the defendant in the course of the hearing abandoned her defense and hence the court made an order for the suit to proceed ex parte.

A joint scheduling memorandum was filed in this court on 9th April 2018 wherein the following facts and issues were agreed for determination by this court:

Agreed Facts

- a) That the defendant was an employee of the plaintiff until the 16th of September 2014.
- b) That the alleged air tickets belong to the plaintiff.
- c) M/s Travelport Uganda Ltd provides a reservation system to the plaintiff called Galileo and the plaintiff assigned Pseudo City Code is 75A5, all Sky Travel Ltd's employees derive their unique sign on IDs from Travelport Uganda Ltd.
- d) That the defendant is a director and shareholder of M/s Friendship International Tours and travel Ltd.

Agreed Issues

1. *Whether the defendant fraudulently/unlawfully obtained money amounting to USD 76,861 from the plaintiff company.*
2. *Whether the parties to this suit are entitled to the remedies sought?*

Representation

The plaintiff was represented by *Counsel Paul Ssebunya and Rola Birungi* while the defendant was represented by *Counsel Oweyesigire Frank (RIP)* who passed on in the course of the trial and the defendant failed to engage legal services of another counsel. The matter proceeded ex-parte after substituted service had been ordered.

At the hearing, the plaintiff called four witnesses that is; Ms. Juan Cheng the managing director of the plaintiff PW3, Mr. Eddy Chou Ting Hsuan a director in the plaintiff company PW1, Doreen Nansamba working with Travel Port Uganda Limited PW2 and Mr. Sebugere Robert a certified public accountant working with Kirangwa and Company Certified Public Accountants PW4.

Determination

Whether the defendant fraudulently/unlawfully obtained money amounting to USD 76,861 from the plaintiff company?

The plaintiff led evidence through PW3 that in the period between May 2014 to September 2014, the defendant as the Operations Manager of the plaintiff working under entry permit no. G2; 151243 using sign on ID number 75A5ZCH which was issued to her by Travel Port Uganda Limited on the instruction of the plaintiff issued air tickets to customers of the plaintiff thereafter collecting money totaling to USD 81,578 but never remitted the same to the plaintiff. The plaintiff contended that the aforesaid money was the property of the plaintiff of which USD 71,316 is the subject of the suit now and the rest subject to the suit before Chief Magistrates Court of Mengo vide Civil Suit No. 1675 of 2014 Sky Travel Co. Limited versus Xing Cheng.

The plaintiff led evidence of exhibit PX43 which was prepared by PW4. Exhibit PX43 showed the issuance of the suit air tickets by the defendant, payment for the same by the plaintiff to the international air transport association, fraudulently invoicing for payment of the aforesaid tickets by the defendant through Friendship International Tours and Travel Limited(a company the defendant had incorporated) to plaintiff's customers.

The defendant filed a trial bundle intended to provide accountability for the air tickets she issued. The trial bundle contained items marked DE4 to DE20 referred to as Ticket cash sales that totaled to USD 57,466 (United States Dollars fifty-seven four hundred sixty-six only) and UGX 390,000 (three hundred ninety thousand shillings only).

PW1 on the other hand testified that items DE4 to DE20 were emails from the defendant to the plaintiff in respect to the acknowledgment by PW1 of payment made to him by the defendant for the air tickets.

The plaintiff filed a supplementary trial bundle which included exhibits PX26 to PX37 and the same was providing evidence of the narration for the payments under exhibits DE4 to DE20 hence confirming that the defendant never remitted the payments she received from the plaintiff's customers in respect to the air tickets.

Exhibits PX7, PX9, PX16, PX24, and PX25 were further documentary evidence which confirmed that the defendant while she had ceased to be an employee of the plaintiff received money from the plaintiff's customers through Friendship International Tours and Travel Limited.

It was the plaintiff's submission that the plaintiff had proved on the balance of probabilities that the defendant embezzled from the plaintiff USD 71,316.

The plaintiff's counsel cited the case of ***Dr. James Kashugyera Tumwine & anor vs Sr. Willie Magara & anor HCCS 576 of 2004*** where it was held;

"A claim for money had and received is an equitable action that may be maintained to prevent unjust enrichment by the defendant when it obtained money which in equity and good conscience belongs to the plaintiff. The plaintiff is not precluded from recovering the amount from the defendant as money had and received.

The other view is that the action for money had and received liability is based on unjust enrichment ie the action is applicable whenever the defendant has received money which in justice and equality belongs to the plaintiff under circumstances which render receipt of it by the defendant receipt to the use of the plaintiff."

Counsel concluded that this issue be answered in the affirmative.

Analysis

The nature of the plaintiff's claim lies in a tort of deceit, fraudulent misrepresentation and fiduciary breaches. The actions of the defendant are bordering on criminality of fraudulent false accounting since it involves an employee altering, destroying or defacing an account or presenting accounts from an individual so that they do not reflect the true value or the financial activities of that company.

The action of the defendant were premised on collection of monies due and owing to the plaintiff during her employment and also after her employment was terminated through her company M/s Friendship International Tour and Travel Ltd in addition to falsification of documents or making false entries in clients' accounts. Therefore, forgery and falsification of documents are mechanisms to commit fraud. Fraud essentially involves using deception to dishonestly make personal gain for oneself and or create a loss for another.

The tort of deceit requires intention by the defendant that his false statement will be acted upon by the plaintiff and that the plaintiff does in fact act upon the statement. The elements of the tort deceit were stated in the case of ***Panatron Pte Ltd v Lee Cheow Lee [2001] 2 SLR (R) 435*** as follows;

- (a) There must be a representation of fact made by word, writing or conduct.
- (b) The representation must be made with knowledge that it is false; it must be willfully false, or at least made in absence of any genuine belief that it is true.

- (c) The representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff.
- (d) The plaintiff had acted upon the false statement.
- (e) The plaintiff suffered damage in doing so.

The tort of deceit seeks to protect the person from injury caused by another's deliberate lie. As such, the representor's dishonest or fraudulent intent is the tort's gravamen. Thus *Andrew Ang J* Observed in in ***Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co [2007] 1 SLR (R) 196:***

“Dishonesty is the touchstone which distinguishes fraudulent misrepresentation from other forms of misrepresentation. This turns on the intention and belief of the representor. A party complaining of having been misled by a representation to his injury has no remedy in damages under the general law unless the representation was not only false, but fraudulent.”

The classic statement as to what constitutes fraud is found in Lord Herschell's judgment in ***Derry v Peek (1889) 14 App Cas 337*** viz, that fraud is proved when it is shown that a false representation has been made knowingly or without belief in its truth, or recklessly, not caring whether it be true or false.

The plaintiff set out the particulars of fraud in the plaint as follows:

- a) The defendant collecting money from the plaintiff's clients and not remitting the same to the plaintiff.
- b) The defendant issuing the plaintiff's clients invoices in the names of M/s Friendship International Tours and Travel ltd

It is well established that an allegation of fraud is, by reason of its gravity, subject to a relatively higher standard of proof. Although this does not require departure from the usual standard of proof applicable in civil suits (i.e. balance of probabilities), it does mean that particularly cogent evidence is needed to prove an allegation of fraud because “the more serious the allegation, the more the party, on whose shoulders the burden falls, may have to do if he hopes to establish his case. See ***Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801**

In ***Trans-World (Aluminium) Ltd v Cornelder China (Singapore)* [2003] 3 SLR (R) 501** it was stated that;

In a civil case where fraud is alleged, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probabilities. The court does not adopt so high a degree as criminal court, but still does require a degree of probability which is commensurate with the gravity of the imputation.

The plaintiff has proved the case against the defendant to the required standard of proof on all the ingredients of the tort of deceit, since the defendant opted not to defend herself against the fraud allegations presented in court, the same are uncontroverted.

The defendant defrauded the plaintiff and its customers through acts of deceit and fraudulent misrepresentations.

The plaintiff had the duty to prove to this court that the defendant obtained money from her clients that the defendant did not remit to the plaintiff.

The defendant’s attempt to make an accountability for the air ticket sales in question was refuted by PW1. PW1 stated that the payment acknowledgments

attached by the defendant were in regard to tickets that were not in issue in this suit hence they were the wrong accountability for the monies she received.

Without any other contradictions or justification, the plaintiff's evidence proved to this court that the defendant had unlawfully obtained USD 76,861 from the plaintiff company.

Whether the parties to this suit are entitled to the remedies sought?

The plaintiff sought special damages to a tune of **USD 76,861** as monies diverted by the defendant from the plaintiff as per the audit and **UGX 1,500,000** being audit fees paid to M/s Kirangwa Kiwanuka & Company Certified Public Accountants in respect of the audit report. The plaintiff contended that this was because the commissioned audit was a result of the defendant's fraudulent actions occasioned to the plaintiff.

It is trite that special damages must not only be specifically pleaded but they must also be strictly proved (see ***Borham-Carter v. Hyde Park Hotel [1948] 64 TLR***). The plaintiff is awarded special damages as pleaded in sum of USD \$ 76,861 and UGX 1,500,000/=.

The plaintiff also sought general damages to the tune of **USD 30,000** against the defendant for causing the plaintiff financial loss.

General damages are awarded at the discretion of the court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the defendant. It is the duty of the plaintiff to plead and prove that there were damages losses or injuries suffered as a result of the defendant's actions.

The essence of damages is compensatory. It is neither to punish the defendant nor confer a windfall on the plaintiff or claimant. It is not meant to punish the claimant/plaintiff and allow the defendant to go without repairing the actual loss caused to the plaintiff or claimant.

The defendant's actions caused great financial loss to the plaintiff. The plaintiff is therefore granted general damages of **USD 10,000**.

The plaintiff is awarded a 5% interest on the special damages from the date of filing the suit till payment in full.

The plaintiff is awarded the costs of this suit.

I so order

SSEKAANA MUSA

JUDGE

30th June 2023