

EDITORIAL NOTE: NO SUPPRESSION APPLIED.

**IN THE DISTRICT COURT
AT AUCKLAND**

**CIV 2014-004-000819
[2017] NZDC 3394**

BETWEEN CHRIS DE VILLIERS
 Plaintiff

AND MANU RASTOGI
 Defendant

Hearing: 21 February 2017

Appearances: Ms N Tabb for the Plaintiff
 No appearance for or by the Defendant

Judgment: 22 February 2017

RESERVED JUDGMENT OF JUDGE N R DAWSON

[1] This claim has been brought by the plaintiff against the defendant alleging the plaintiff was induced to enter into a contract with the defendant on the basis of misrepresentations by the defendant. This matter has been set down for hearing on three previous occasions but those hearings were adjourned on applications made by the defendant. The defendant failed to appear for the hearing set down for 21 February 2017. By an email dated 20 February 2017 he wrote to the Court:

I would leave it to the Hon Judge Harrison and the judicial system of New Zealand and hope for justice. I withdraw my defence and rest my case on my brief of evidence and affidavit attached here.

[2] No brief of evidence or affidavit was attached to the email and it is assumed that the defendant is referring to his previous brief of evidence and an unsworn affidavit filed in this Court.

[3] The Court understands that the defendant is now resident in Australia. It would appear that he has no intention of ever attending a hearing for this matter before this Court. This hearing proceeded on the basis of it being a formal proof procedure while taking into account the evidence such as it is previously filed with the Court by the defendant.

[4] The background to this matter is that the plaintiff answered an advertisement dated 6 February 2009 entitled "Sales Manager/Partner South Auckland" which indicated that the successful applicant would expect to receive \$100,000 as a base salary plus a share of profits working with a prominent recruitment company in Auckland. It went on to say:

The business is based in South Auckland and now seeks a partner to join the business to help grow this new focus.

[5] The plaintiff sent his curriculum vitae on 3 March 2009 and also telephoned and spoke to a representative of the franchisor, EVP Recruitment. That representative set up a meeting in early March between the plaintiff and the defendant, the franchisee, who continued thereafter to have a number of meetings to discuss the business.

[6] The plaintiff states that the representations made to him were:

- (a) The defendant's business (Assure Business Services Limited trading as EVP Hospitality and Tourism) was doing reasonably well.
- (b) The turnover was \$180,000 per annum.
- (c) The business could be doubled or tripled if the owners worked hard.
- (d) The existing business which was coming in over the next 12 months was all Super 12 rugby and cricket games at Eden Park, all Warriors games at Mt Smart in Ellerslie or Alexandra Park racing meetings.

[7] The plaintiff alleges that the defendant personally assured him that if any of the information he had given the plaintiff or representations he had made turned out to be false, then all money the plaintiff invested in the business would be refunded to him in full personally by the defendant.

[8] The plaintiff alleges that the defendant provided him with an invoice for the period April 2007 to March 2008 which showed invoices totalling \$235,284.18 from clients including top end hotels and Eden Park, Alexandra Park, and the Ellerslie Events Centre. The plaintiff says the defendant also provided a management income and expenditure statement for the year to 31 March 2009 showing a total income of \$192,875.73 with a gross profit of \$138,308.77 and a net profit of \$96,902.57. The plaintiff says the defendant also provided an invoice schedule for the period April 2008 to March 2009 which had invoices totalling \$192,787 from clients including ASB Showgrounds, Ellerslie Events Centre, Eden Park, and Mt Smart.

[9] The plaintiff applied to the ASB for a loan to raise funds to purchase half of the business. The loan application refers to an annual turnover of \$230,000 per annum for the year ended March 2008 and \$200,000 for the year ended March 2009. It referred to contracts including all Super 14 matches at Eden Park, local and international cricket at Eden Park, Ellerslie Racecourse, hotels and travel companies.

[10] A new company, EVP Recruitment Auckland Limited (EVP) was incorporated. The plaintiff owned 49 percent of the shares, the defendant owned 51

percent of the shares, and both were directors of this new company. The franchise agreement was transferred to the new company.

[11] The plaintiff alleges that the evidence shows that:

- (a) No income was ever deposited into the business bank account of EVP;
- (b) The tax return filed by the defendant for his business for the year to 31 March 2009 only showed a taxable income of \$7,356;
- (c) Eden Park used the defendant's business once in August 2008 and did not use them again;
- (d) Mt Smart did not use the defendant's business;
- (e) Alexandra Park did not use the defendant's business;
- (f) Of the 18 scheduled events in the three months after 1 April 2009 at least 11 did not take place;
- (g) At least 10 invoices generated by the defendant in the three months after 1 April 2009 were false or not genuine. None of those invoices were paid;
- (h) Of the projected income for March, April and June 2009 based on the defendant's turnover figure and expected future business of \$133,653, only \$25,379 was invoiced and nothing was actually deposited into EVP's bank account.
- (i) April, May and June 2009 the defendant continued to invoice under the name of his old company instead of the new company, EVP.

[12] The plaintiff says he relied on the representations made by the defendant in making his decision to invest in the business. The plaintiff says that he was only willing to invest in the business on the basis of the financial information provided by

the defendant and the defendant's personal assurance that the information provided the plaintiff is true and correct and that all future business would be put through the newly formed company, EVP.

[13] There is strong documentary evidence supporting all the allegations of the plaintiff. The evidence provided to the Court by the defendant's unsworn affidavit and his submissions in his brief of evidence are unconvincing. In any event, he has withdrawn his defence to the allegations made by the plaintiff.

[14] I am satisfied on all the evidence provided to this Court that the plaintiff was induced to enter into a business arrangement with the defendant on the basis of gross misrepresentations made by the defendant to the plaintiff. I am satisfied that without these misrepresentations the plaintiff would not have paid money into EVP and commenced work with the defendant.

[15] Section 9 of the Contractual Remedies Act 1979 (the Act) empowers the Court to grant relief. Section 6 of the Act entitles the plaintiff to damages to be awarded against the defendant for the misrepresentations that induced the plaintiff to enter into a contract.

[16] The plaintiff seeks reimbursement of the payments made by him into EVP. His financial contributions were as follows:

- (a) \$57,536 paid directly to the bank account of EVP; and
- (b) \$11,632.38 paid from his personal funds to set up the office for EVP.

[17] Copies of the bank accounts for EVP have been produced by the plaintiff that show he has paid \$57,536.47 into the company. The plaintiff has also produced a schedule of payments showing that he has spent \$11,632.38 on a variety of office supplies for the company. The plaintiff has therefore established that he has paid the total amount of \$69,168.38 into and for EVP.

[18] In the defendant's brief of evidence at paragraph 33, the defendant alleges the plaintiff took \$7,500 from the company account and also furniture and fittings worth

around \$2,000. The plaintiff says that he in fact took out \$7,900 from the company account and that is shown from the company's bank statement on 6 August 2009. The plaintiff has produced a schedule showing payments drawn by the plaintiff and the defendant from the business. The schedule shows that the defendant took out \$28,472, with the plaintiff drawing a much lesser amount of \$14,500. The plaintiff says the \$7,900 was taken to get him nearer to an equalisation of drawings with the defendant. This amount was taken because it was all that was available in the company account. He also says that both he and the defendant to authorise that payment to the bank before it could be paid, which they did, and the payment was made to the plaintiff.

[19] The plaintiff says that he did take furniture but it was not worth as much as \$2,000. He says that the furniture and fittings of the business were divided roughly equally between himself and the defendant, as they had agreed. He says that even taking this into account he has drawn much less from the company than the defendant.

[20] The payment of \$7,900 and a taking of approximately half of the furniture and fittings was not a repayment of the funds he invested into the company, but drawings from the company just as the defendant was drawing funds from the company. The evidence produced by the plaintiff supports his contention and the defendant has not chosen to defend that claim. The amount due to the plaintiff for capital payments into and for EVP remains the same.

[21] During the course of the proceedings the defendant filed a counter claim for \$67,500 plus damages and costs for the loss of the franchise from the franchisor.

[22] The plaintiff acknowledges that the defendant's previous company had paid this franchise fee and, upon the incorporation of EVP in which the plaintiff was a director and shareholder, the franchise was transferred to that new company. The plaintiff says he exited from EVP and transferred his shares back to the defendant on 21 August 2009, on the same day as he took the final drawings payment of \$7,900. He submits that the company was not struck off by the Companies Office until

22 December 2011, over two years later, and he has no knowledge of why the defendant did not continue in business and maintain the franchise.

[23] There appears to be no basis for this counter claim. The defendant has not appeared at the hearing to advance his counter claim and therefore it is struck out accordingly.

Conclusion

[24] The plaintiff has established that he paid \$69,168.38 into the company based upon the misrepresentations made by the defendant inducing the plaintiff to enter into a contract with the defendant and he is entitled to have this money returned to him. Judgment is entered for this amount accordingly. Costs are also awarded to the plaintiff on a 2B basis as previously directed by this Court in its minute dated 2 April 2015.

N R Dawson
District Court Judge