STATE OF MICHIGAN

COURT OF APPEALS

DETROIT THERMAL, LLC,

Plaintiff-Appellee,

v

HIGHGATE HOTELS, INC.,

Defendant-Appellant.

UNPUBLISHED
January 13, 2009

No. 276321
Wayne Circuit Court
LC No. 04-436053-CZ

Before: Davis, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

In this breach of contract action, defendant appeals as of right from the bench trial judgment in favor of plaintiff. We reverse.

I

Plaintiff is a provider of steam for heating buildings. Defendant, a Texas corporation registered in Michigan, operated the Pontchartrain hotel in downtown Detroit, pursuant to a hotel management agreement entered into between defendant, as "operator," and Pontch Limited Partnership (PLP), described therein as the "owner" of the "Crown Plaza Pontchartrain." On November 20, 1998, plaintiff's predecessor, Detroit Edison, entered into an agreement[1] to sell steam for the Pontchartrain hotel for five years, with options to renew for additional terms of years. The buyer of the steam, dubbed "the customer" in the Steam Agreement, promised to pay for the steam. The Steam Agreement created an open account.

Dale Gannon, the general manager of the Pontchartrain hotel, signed the Steam Agreement on behalf of "customer." At the end of the Steam Agreement, "the customer" is referred to as "Pontchartrain." Defendant did not authorize Gannon to sign the agreement.

In 2003, plaintiff purchased relevant steam system assets from Detroit Edison, and succeeded to Detroit Edison's rights under the Steam Agreement at issue here. Plaintiff sent defendant statements of the account, which defendant received and, pursuant to the management

[1] The agreement is titled "THERMAL ENERGY THERMAL ENERGY DIVISION MID-SIZE STEAM SALES AGREEMENT," hereafter "the Steam Agreement."

agreement, paid out of the PLP operating expense account that was funded exclusively by deposits of revenue from the hotel. In September 2004, after having lost more than ten million dollars operating the hotel, PLP surrendered ownership of the hotel to GE Capital. When plaintiff received notice of the deed surrender, it terminated the Steam Agreement and purported to exercise an early-termination clause in the Steam Agreement.

In October 2004, plaintiff made a demand for payment by defendant, claiming a debt of $195,570 for invoices for steam usage for June through September of 2004, and approximately $96,000 for early termination of the agreement. Defendant did not pay as demanded, and, plaintiff sued for account stated, quantum meruit (quasi-contract), unjust enrichment, and two counts of breach of contract (one for failure to pay for steam, and the other for early termination of the agreement). Defendant moved for summary disposition below, and the trial court denied the motion. This appeal ensued.

It is undisputed that defendant is not designated as a party to the Steam Agreement. Thus, the central issue in this case is, whether defendant is liable under the Steam Agreement. The Steam Agreement purports to bind the "customer," but does not identify the customer as an entity but instead refers to the address where the steam would be consumed. We conclude from our review of the record that the trial court erred in denying defendant's motion for summary disposition because defendant was not a party to the agreement.

II

We review a lower court's determination regarding a motion for summary disposition de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38; 718 NW2d 386 (2006).

III

First, we agree with defendant's contention that Gannon was an employee of PLP, rather than of defendant. Under the hotel management agreement, between defendant and PLP, defendant needed PLP's approval to hire or fire the general manager, and defendant retained only the powers to "recruit, train, direct, [and] supervise" the general manager. Therefore, Gannon was an employee of PLP, not of defendant. As such, Gannon could not bind defendant, and when Gannon signed the Steam Agreement, he acted on behalf of PLP, and not on behalf of defendant.

Further, under the economic reality test, PLP, and not defendant, employed Gannon. In *Mantei v Michigan Pub School Employees Retirement Sys*, 256 Mich App 64, 78-79; 663 NW2d 486 (2003), this Court enumerated the factors composing this test:

> The economic-reality test considers four basic factors: (1) control of a worker's duties, (2) payment of wages, (3) right to hire, fire, and discipline, and (4) performance of the duties as an integral part of the employer's business toward the accomplishment of a common goal. This test considers the totality of the circumstances surrounding the work performed. No single factor is controlling and, indeed, the list of factors is nonexclusive and other factors may be considered, as each individual case requires. Thus, the element of control, "although abandoned as an exclusive criterion upon which the relationship can be

> determined, is a factor to be considered along with payment of wages, maintenance of discipline and the right to engage or discharge employees." Weight should be given to those factors that most favorably effectuate the objectives of the statute in question. [(Internal citations omitted.)]

There is evidence that defendant had control of Gannon's duties. PLP and its partners, the Khimji family members, were not involved in the daily operations of the hotel. Thus, the first factor weighs primarily in plaintiff's favor (in favor of the view that defendant was Gannon's employer).

But PLP paid Gannon's wages. The hotel management agreement provided that employee wages were considered an operating expense, which were to be paid by defendant, on PLP's behalf, from PLP's bank account. Gannon and Steve Barick, defendant's chief officer, testified that PLP's name appeared on the employees' paychecks and W-2 forms. Thus, the second factor weighs in defendant's favor (in favor of the view that defendant was *not* Gannon's employer).

Although defendant had the power, under the hotel management agreement, to hire, fire and discipline the hotel's general manager (Gannon), *PLP retained the ability to veto* defendant's decision to hire or fire this key manager. Thus, PLP had final authority to make binding decisions regarding hiring and firing the general manager. Accordingly, the third factor, while close, ultimately weighs in defendant's favor.

The fourth factor of the economic reality test weighs in favor of both PLP and defendant. The duties of the general manager would be an integral part of both PLP's and defendant's "business toward the accomplishment of a common goal," i.e., making a profit at the hotel.

Thus, one factor favors plaintiff's claim that defendant employed Gannon, and another factor favors the view that both defendant and PLP employed Gannon, but two factors favor defendant's view that PLP employed Gannon. When reviewing a trial court's findings of fact, we defer to the trial court's superior position personally to observe the witness testimony. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004). The trial court held that Gannon was an employee of defendant, but insofar as this ruling was a finding of fact, we are left, given the above analysis, with a definite and firm conviction that a mistake has been made. *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002).

We disagree with plaintiff that defendant could be held liable as the agent of an undisclosed principal. Although an agent may be held personally liable for contractual obligations, when she failed to notify the plaintiff of the identity of her principal (or that she was an agent for a principal), and the plaintiff had no other means of notification, *Penton Publishing, Inc v Markey*, 212 Mich App 624, 626-627; 538 NW2d 104 (1995); *Detroit Pure Milk Co v Patterson*, 138 Mich App 475, 478; 360 NW2d 221 (1984), here defendant was no one's agent.

In addition, defendant contends that plaintiff should have discovered the true identity of the "Pontchartrain" customer, before purchasing the assets of Detroit Edison that gave plaintiff the rights under the agreement at issue here (the central steam system). We agree. Plaintiff, as a

sophisticated contracting party, could have, through diligent investigation, discovered that PLP, rather than defendant, was its customer.

Next, defendant contends that we must vacate the award of case evaluation sanctions because the trial court should have entered judgment in its favor. Because we find that the trial court erred in denying defendant's motion for summary disposition, we agree that the award of case evaluation sanctions must be vacated.

Finally, defendant further contends that at trial, the trial court erroneously allowed plaintiff to present hearsay testimony. Given our holding that the trial court erred in denying defendant's motion for summary disposition, this issue is moot. *Ewing v Bolden*, 194 Mich App 95, 104; 486 NW2d 96 (1992).

Reversed and remanded for entry of summary disposition in defendant's favor, and for vacation of the award of case evaluation sanctions. We do not retain jurisdiction. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Alton T. Davis
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello