[2020] IEHC 36

THE HIGH COURT

[2018/743 S.]

BETWEEN

CECELIA OMEYEMMEZU T/A AS NORLIA RECRUITMENT SERVICE

PLAINTIFF

AND

FIRST CARE IRELAND LIMITED, FIRST CARE IRELAND (BLAINROE) LIMITED, FIRST CARE IRELAND (EARLSBROOK) LIMITED, FIRST CARE IRELAND KILCOCK LIMITED, BENEAVIN HOUSE LIMITED, BENEAVIN LODGE LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Hyland delivered on the 23rd January 2020

Introduction

1. This is an application for summary judgment against the Defendants pursuant to O. 37, RSC in the sum of €749,353.40 together with interest due and owing to the Plaintiff by the first named Defendant for services rendered and/or in the alternative of €100,606.14, due and owing by the second named Defendant, €168,716.99 due and owing by the third named Defendant, €220,518.31 due and owing by the fourth named Defendant, €200,326.04 due and owing by the fifth named Defendant and €59,185.92 due and owing by the sixth named Defendant, the combined total being €749,326.40 owed to the Plaintiff for services rendered to the Defendants and/or each of them respectively.

2. This case has a somewhat tortured history in circumstances where judgment in the amount sought was given by O'Hanlon J. on 1st July 2019 in the Defendants' absence, in circumstances where the Defendants did not appear due to inadvertence. A motion to set aside that Judgment was brought. Ultimately the Judgment was set aside by way of an Order of Humphreys J. of 25th September 2019. There has been an appeal against the decision of Humphreys J. of 25th November 2019 to refuse the application made by the Plaintiff for the DAR of the hearing which resulted in his decision but the outcome of that appeal cannot affect the decision in this application and therefore I am in a position to give judgment without waiting for that appeal to be determined.

3. Accordingly, one High Court Judge has granted summary judgment in the matter and another High Court Judge has set that judgment aside.

4. I am now charged with the task of considering de novo whether the Plaintiff is entitled to summary judgment according to the normal principles applicable to such an application.

Factual Background

5. The Plaintiff, an individual trading under the business name Norlia Recruitment Service, is involved in the provision and recruitment of temporary/relief staff in the health care sector, and the supply of same to entities such as the Defendants. Five of the Defendants are companies that own and/or operate nursing homes, being the second to sixth named Defendants. The first Defendant is the owner and/or operator of nursing homes and was at all material times responsible for the management of the second to sixth named Defendants.

6. The Plaintiff provided such services to the second to sixth named Defendants from May 2015 onwards up until the end of December 2017. It appears that the services for 2015 were paid for, with some deductions and credit given by the Plaintiff, in circumstances where the Defendants say there was over-charging and the Plaintiff says the deductions/credits were given in the interests of commercial relations. In my view that dispute is not relevant to the matter before me since no monies are sought in respect of services provided in 2015 and therefore I do not need to make a finding on same.

7. What is not disputed is that in respect of services provided by the Plaintiff from the start of 2016 to the end of 2017 i.e. two years, no payment has been made and no invoices discharged by any of the Defendants.

Applicable Law

8. The principles identifying when summary judgment ought to be granted are well-established. In *Ulster Bank Ireland Ltd v. Beades* [2019] IESC 83, McKechnie J. held that leave to defend should be granted where there is a fair or reasonable probability that a real or bona fide defence exists or that what is averred in the Defendant's affidavit is credible. In *Harrisrange Ltd v. Duncan* [2002] IEHC 14, McKechnie J. noted that power to grant summary judgment should be exercised with discernible caution. He also noted that leave should not be granted where the only relevant averment in the totality of the evidence is a mere assertion of the situation which is to form a defence. In *Aer Rianta cpt v. Ryanair Ltd (No 1)* [2001] 4 IR 607, Hardiman J. identified that the Court must ask whether the Defendant's affidavit discloses an arguable defence. In *IBRC Ltd. v. McCaughey* [2014] 1 IR 749, Clarke J. noted as follows:

> *"Insofar as facts are put forward, then subject to a very narrow limitation, the court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or similar circumstances such as those analysed by Hardiman J. in Aer Rianta".*

9. The above case law makes it clear that there is a low bar for a Defendant to circumvent when it is seeking to have a matter sent to plenary hearing.

Summary of Affidavit Evidence

10. In the Affidavit of Ms. Oneyemmezu sworn on 25th September 2018 grounding the motion for judgment, Ms. Oneyemmezu avers that the services were provided pursuant to a contract in writing dated 23rd May 2015 and she exhibits same together with the terms of business and amended terms at "CO1". She says at para. 5 that she was first requested to provide staff by the deputy nursing home manager of the fifth named defendant on 22nd May 2015, and that she supplied a staff nurse the following day and

other staff and that terms of business were furnished to the fifth named defendant and on 26th May 2015 a meeting was held with Ms. Mary Lloyd, nursing home manager with the fifth named defendant and the signed contract was furnished by Ms. Lloyd to her.

11. She then avers at para. 6 to para. 9 that she concluded agreements to provide the sixth named defendant, the third named defendant, the fourth named defendant and the second named defendant with staff and same was governed by parole agreement and she exhibits notes of memoranda of these conversations. Those exhibits were not legible and I asked for better copies and same were provided to me. On inspection, what appears to have been provided are sign in sheets for staff but they do not appear to refer to any of the Defendant nursing homes or terms of agreements with them.

12. Ms. Oneyemmezu then identifies certain terms of that contract with each of the Defendants and says it was amended by written agreement on the 7th and 15th November 2016 and refers to correspondence to this effect. I deal with that correspondence in detail below. Also exhibited to the Affidavit are invoices for each and every hour worked by the staff employed by the Plaintiff including the time worked, the status of the staff (whether nurse or health care assistant), the amount charged and the date.

13. A replying affidavit was filed on behalf of all Defendants by Mr. Smith on 17th December 2018. In it he avers that identified that no sums were due and owing by the Defendants or any of them to the Plaintiff and that such books and records did not disclose any unpaid invoices due and owing to the Plaintiff by the defendants or any of them. He avers that what is described as “First Care” was contacted by the Revenue Commissioners and in response to an inquiry as to whether sums were due and owing, First Care confirmed that no monies whatsoever were due and owing to Norlia Recruitment Service in January 2018. It seems to me that the Defendants are making the case, as set out below, that no monies were due and owing because contractual conditions had not been complied with and it was in this context that the averments are made. As I have noted above, there are no averments in the affidavit that the services were not provided as identified in the invoices exhibited.

14. Mr. Smith further avers that in respect of the agreement at “CO1”, (described by him as an “SLA” (service level agreement)), signed by the Financial Director of the fifth named defendant, Beneavin House Nursing Home, there is no signed counterpart from Norlia Recruitment Service. At para. 7 it is alleged that there had been overcharging in respect of services provided in 2015 and that as part of further discussions between First Care and Norlia it was agreed that henceforth very detailed protocols for service delivery, invoicing, supporting documentation and compliance validations would be provided to First Care so as to ensure full transparency with respect to all aspects of the business relationship with Norlia but that notwithstanding this agreement Norlia failed to adhere to the agreed protocols. No detail is given of the alleged agreement made subsequent to the SLA, or of documentation evidencing same or identification of the protocols alleged.

15. There is an assertion in para. 10 and 11 that there was a confusion on the part of the Defendants as to who the Plaintiff purported to represent and it was identified that there was an identity called Norlia Limited with an address in County Tipperary that was dissolved as a limited liability company in 2017 and that Norlia had changed the names of the legal entities on their invoices submitted throughout the course of trading. However, no documentation was exhibited to support this averment and all invoices that were exhibited to the affidavit of Ms. Oneyemmezu were sent by Ms. Oneyemmezu trading as Norlia Recruitment Service. Accordingly, I do not accept that there was confusion of the sort asserted and I do not believe this issue constitutes a prima facie defence to the claim, although in fact as I understand counsel did not make the case that it constituted same.

16. At para. 4 of the replying Affidavit of Ms. Oneyemmezu sworn on 6th February 2019, she avers that it was directly and/or implicitly agreed that the parties are bound by the written terms of the written terms of the agreement executed and dated 23rd May 2015, referred to by the Defendants as the SLA. At para. 5 it is averred that the payment of invoices by the Defendants of amounts due and owing at the end of 2015 clearly demonstrates acceptance of the terms and conditions of the contract.

17. Finally, there is the supplemental affidavit of Mr. Smith sworn 17th December 2019. The Plaintiff refused to consent to its admission. Accordingly, at the start of the hearing, I was required to rule on its admission. The justification for the late admission of an affidavit after pleadings had closed was said by counsel for the Defendants to be because of the necessity to address comments made in the course of the hearing before Humphreys J. on 25th September 2019 and/or comments made in his written judgment. Whether it was because of the hearing or whether it was because of the written judgment, the fact is that the written judgment was delivered on 5th November 2019 and the affidavit was not sought to be introduced until 17th December 2019 in respect of a hearing fixed for 13th January 2020, where proceedings had issued on 14th June 2018. By any standards that is very late in the day to seek to introduce new affidavit evidence. Ultimately, I agreed that the affidavit should be introduced after counsel for the Plaintiff, Mr. Quirke indicated that he would be in a position to deal with it in the course of the hearing.

18. In that Affidavit, Mr. Smith asserts that the defence to the claim is that the protocols already agreed had not been complied with. He avers at para. 6 that there had been a breach of the SLA and that additional charges had been imposed over and above the agreed SLA terms. Reference is made at para. 8 to the email of 15th September 2016 and the reference thereby to Mr. Byrne to the effect that rate charges applied as per the SLA. At para. 11 it is averred that Mr. Byrne contacted the Plaintiff during September and November 2016 in relation to the important price and related terms and conditions in the SLA and all the critically important non-pricing related protocol agreed between the parties to ensure that (a) there would be no reoccurrence of overcharging by the Plaintiff; and (b) the Plaintiff and Defendants were operating legally in the eyes of the HIQA, NERA, the Gardaí and the Revenue Commissioners. At para. 12 he says that as part of the SLA

the Plaintiff and Defendants have agreed that in order for any of the invoices to be considered, accepted, approved and due for payments the Plaintiff is required to provide the following to the Defendants with each invoice: (a) confirmation that the nurses provided for the defendant's nursing home are qualified and registered with the nursing governing body, the Nursing and Midwifery Board of Ireland; (b) confirmation that all nurses provided to the defendant's nursing home were Garda vetted. He goes on to say that both of those conditions are critical conditions for the Defendants' nursing homes to comply with the requirements of their governing body, HIQA. He asserts at the end of para. 12 that if they did not comply with HIQA registration criteria they could lose their licence, referring to the protocols "detailed in the SLA". He goes on to say at para. 13 that the parties also agree that the Plaintiff would have in place a valid and current tax clearance at the time of seeking a proposed payment from the Defendants and that the Plaintiff agreed and to comply with this protocol the Plaintiff agreed that it would supply the access number for verifying the tax clearance certificate online to the Defendants.

Nature of bona fide defences identified

19. The primary *bona fide* defence that has been identified by the Defendants is that there were protocols that had been agreed as part of the SLA whereby it was agreed that with each invoice presented, the Plaintiff would provide proof that the relevant staff member was qualified, was registered with the NMBI, and was Garda vetted. It was further asserted it had been agreed that the Plaintiff would always have in place a valid tax clearance certificate. The Defendants assert that due to alleged non-compliance with these conditions, they are not obliged to pay on foot of the invoices raised by the Plaintiff for 2016 and 2017.

20. There is also a subsidiary defence which was only identified by counsel for the Defendants, Mr. Fitzgerald BL in argument to the effect that the SLA exhibited is not the agreement governing relations between the parties due to it being unsigned, that there is no evidence of the contractual relationship between the Plaintiff and the first to fourth Defendants and sixth Defendant, given that the SLA exhibited only refers to the fifth Defendants, Beneavin House Ltd. and that there is uncertainty in relation to the terms of the contract. He asserts that it necessary that those issues to be dealt with at oral hearing and that there is accordingly a prima facie defence insofar as there is uncertainty in respect of contractual conditions between the Plaintiff and the Defendants.

21. I will deal with the above defence first and then address the argument in respect of the defence going to the alleged breach of protocols.

22. Before doing so, I should note that counsel for the Defendants asserted at the hearing that he noticed a significant time gap between the issue date of the invoices and the time to which they related. There was no complaint about this on affidavit or any assertion that it constituted a defence to the claim for payment. Nor was any such argument made by counsel for the Defendants. For that reason, I do not consider this observation relevant to the determination of this application.

Uncertainty in relation to the terms of the contract between the Plaintiff and the Defendants as a prima facie defence

23. As noted above it was asserted in Mr. Smith's first affidavit that the plaintiff had not signed the counterpart of the document exhibited at CO1. In that averment there was no statement to the effect that the agreement was not binding or that it only bound one nursing home, i.e. the one with whom the agreement had been signed. No conclusions were sought to be drawn from the lack of a counterpart signature.

24. However, at hearing Mr. Fitzgerald BL for the Defendants asserted that only one agreement had been exhibited, that the SLA was exhibited was unexecuted, that there were five nursing homes as Defendants and the SLA exhibited only referred to one of those Defendants, and that it was for the Plaintiff to make out their case. He submitted the agreement between the parties was governed by an SLA and parole evidence as supported by the exhibits. He argued that a plenary hearing was necessary to determine the terms of the contract between the parties, given the lack of an executed written agreement and the ambiguity between the parties re the terms of the agreement. He said the question as to whether the protocols could form part of the contract was a matter to be determined by oral evidence.

25. I have some concerns about the Defendants' argument that the SLA as exhibited did not govern the agreement between the parties, given that in the context of the protocol argument, the core defence identified was that the SLA contained the protocols allegedly not complied with. Indeed Mr. Fitzgerald for the Defendants identified parts of the SLA exhibited at CO1 to attempt to demonstrate to me where same were to be found. It is therefore quite inconsistent for Mr. Fitzgerald to make the case that the SLA does not apply while relying on same in support of his argument on the protocols. Moreover, as referred to above, in both of Mr. Smith's affidavits, he refers to the SLA with no reservations about its applicability and exhibits emails from Cliff Byrne on behalf of the Defendants that refer to the SLA, clearly treating same as the document that governs contractual relations between the Plaintiff and all six Defendants.

26. However, the sequence of correspondence from 7th September 2016 to 15th November 2016 does give me considerable cause for concern in respect of the argument made that the Defendants have a defence based on uncertainty in relation to the terms of the contract and that a plenary hearing is required in respect of same.

27. Following the presentation of invoices for 2015, Mr. Byrne sent an email of 7th September 2016 whereby he identifies minor issues in respect of the time sheets submitted and evaluates the invoices by reference to the terms of the SLA in respect of hourly rates and administration fees (allegedly not in compliance with the terms of the SLA) and staff orientation and travel expenses (allegedly not provided for in the SLA). He asks to meet up to resolve the issues. A further email is sent on 15th September 2016 stating that the invoice has been recalculated and the rates/charges as per the SLA have been applied and that the recalculation will be applied to all previously submitted invoices and future invoices will be calculated in the same manner.

28. On 7th November 2016 Norlia reply responding to the points made and accepting certain adjustments and indicating that the adjustments will apply in respect of the invoices from May 2015.

29. On 15th November 2016, Norlia write to Mr. Byrne again referring to a telephone conversation with Mr. Byrne of 10 November 2016 and stating that progress has been made in terms of resolving matters raised by him in September and noting that no formal response to that correspondence has been provided. The writer says they will be prepared to accept certain arrangements in respect of the invoices for the period May to December 2015 in relation to the matters raised in September, viz travel costs, hourly rate, administration fee and staff tailored orientation. They seek Mr. Byrne's commitment to a payment plan to ensure that fees are discharged in a timely manner in accordance with the terms of a Schedule and enclose proposals in respect of the Schedule and ask that he reverts to confirm same are acceptable. In respect of invoices for 2016 they say they will issue replacement invoices for January and February and that the remaining invoices will be furnished to him upon hearing from him in regard to the above arrangements (my emphasis added). The letter concludes by saying that they will expect payment of each invoice within 30 days and they seek confirmation that same is acceptable. This 30 day period is a variation of the period of time identified in the SLA, being 14 days. Finally, the writer asks Mr. Byrne to acknowledge receipt and to reply at earliest convenience as they wish to conclude this matter without delay or further inconvenience.

30. Further, as noted above, the document exhibited at CO1 only refers to the Plaintiff and the fifth named Defendant and there is no documentation exhibited in relation to the contractual terms as between the Plaintiff and the other Defendants, although it does appear that the Defendants proceeded on the basis that the SLA governed the relationship with all Defendants.

31. Having regard to the above chain of correspondence and the terms of CO1, it appears to me that there is significant uncertainty as to the terms of the contract between the various parties. The invoices the subject of this claim cover the entirety of 2016/2017. The contractual arrangements applicable might be confined to those in the SLA, i.e. the document exhibited at CO1; or they might be those that appear to have been unilaterally applied by the Plaintiff set out in the 15 November letter (although the payment terms are not disclosed as the proposals in respect of the Schedule are not exhibited); or they might be those identified by the Defendants in the September 2016 emails; or they might be some other set of terms altogether. What is clear is that there is a significant question as to the contractual terms that govern the relationship between the parties for the years 2016/2017 and that having regard to the material exhibited, it is not possible to state with certainty the contractual terms between the Plaintiff and each of the Defendants.

32. Applying the case law and having regard to the passage quoted above of Clarke J. in IBRC v. McCaughey, I consider that the evidence before the Court is such as to suggest that there is a real issue as to the contractual terms between the parties. I cannot characterise

the prima facie defence identified as simply a mere assertion unsupported by evidence or inconsistent with uncontested documentation.

33. In those circumstances, I am of the view that the Defendants have established a bona fide defence in respect of the question as to the contractual terms that governed the invoices for 2016/2017.

Alleged non-compliance with Protocols as a prima facie defence

34. Given my conclusion above, it may not be strictly necessary to adjudicate on the defence identified in respect of the protocols. However, for the sake of completeness, I have decided to do so.

35. Having regard to the document exhibited at "CO1", referred to by the Defendants as the SLA, I am satisfied that the SLA did not contain protocols requiring the submission each time an invoice was presented of proof of the nurse's registration, qualifications and Garda vetting. There is no requirement in the SLA that same must be provided to the defendants with each invoice.

36. This conclusion is borne out by the fact that invoices for 2015 were presented by the Plaintiff and paid by the Defendants and none of those invoices include proofs of registration, qualifications or Garda vetting. Despite there being queries by the Defendants on the amounts in those invoices, no issue whatsoever was taken by the Defendants in respect of the absence of registration, qualifications or Garda vetting. Nor is there any correspondence exhibited by either party demonstrating that the Defendants believed the asserted protocols to be part of the SLA.

37. The Defendants placed significant reliance upon an email of 14th December 2017 from Cliff Byrne to Norlia where he stated that in order to commence review, process, sign off and payment, he required Garda vetting and relevant qualifications in respect of all staff as well as a tax clearance certificate with an access number for online use. However, that email does not even reference the SLA or assert that those requests are a condition of the SLA.

38. In relation to the alleged protocol in respect of the tax clearance certificate, it is somewhat difficult to understand from the affidavits whether it was alleged that this was part of the original SLA or was a later collateral contract. If the former, there was certainly no obligation in the SLA placed on the Plaintiff to provide details of tax clearance certificates with its invoices.

39. Accordingly, I find that on the evidence put before me by the Defendants, i.e. the SLA and the emails, there was no obligation to comply with the protocols contended for by the Defendants arising out of the terms of the SLA.

40. Equally, in relation to any collateral contract, amending the SLA, there is no evidence in the Defendants' affidavit as to the nature of any such collateral contract and how it may have operated to impose an obligation to comply with the alleged protocols as a condition of payment. In Mr. Smyth's Affidavit of 2018, it is asserted at para. 7 that as a result of

further discussions it was agreed that very detailed protocols would be provided to First Care. This is the height of the evidence on affidavit in respect of this alleged defence. Taking it at its highest, this appears to be an assertion that there was some type of collateral contract agreed or an amendment to the SLA post 2015. However, there is no description of what was agreed, who agreed it, when it was agreed, the nature of the obligation or any other detail whatsoever. Mr. Smyth makes an averment at para. 7 of his first Affidavit to refer to an agreement in respect of protocols for service delivery, invoicing, supporting documentation and compliance validation. This may refer to the interaction in September and November 2016 although he identifies no details in respect of same. Those emails have been described above and deal with a variety of matters, notably agreed rates and payment terms but they make no reference whatsoever to protocols in respect of qualifications, registration, vetting or tax clearance certificate. Moreover, the averment at para. 7 is contradicted by the Supplemental Affidavit of Mr. Smith of 17th December 2019 insofar as he avers that the protocols in respect of proof of registration, qualifications and Garda vetting were always part of the SLA.

41. In summary, there is no basis disclosed on the affidavit evidence to support the assertion that protocols in respect of registration, qualification, Garda vetting or tax clearance were part of the contracts, whether the original SLA or a collateral contract or some amendment to the SLA and that the alleged breach of the protocols justifies the non-payment of invoices.

Conclusion

42. It is striking that nowhere in the affidavit evidence of the Defendants does Mr. Smith deny that the services the subject matter of the invoices of 2016/2017 were provided to the Defendants, being the provision of nursing and health care assistant services to five nursing homes over two years. Rather, he denies that the monies sought are due and owing. If the Plaintiff is correct and the monies sought are due and owing, those monies have been outstanding for some very considerable amount of time. In the circumstances I would urge both parties to expedite the trial of this matter.