



**COMMONWEALTH OF THE BAHAMAS**  
**IN THE SUPREME COURT**  
**Common Law and Equity Side**  
**2015/CLE/gen/FP/00011**

**BETWEEN**  
**GERMAN HOLIDAY PARK CONDOMINIUM ASSOCIATION**  
**Plaintiff**  
  
**AND**  
**MICHELLE OUTTEN**  
**Defendant**

**BEFORE:** The Honourable Justice Petra M. Hanna-Adderley

**APPEARANCES:** Mrs. Tiffany Dennison for the Plaintiff  
Mrs. Cassietta McIntosh-Pelecanos for the Defendant

**HEARING DATE:** October 29, 2018 and May 16, 2019

**JUDGEMENT**

**Hanna-Adderley, J**

**Introduction**

1. This is an action by the Plaintiff commenced by a Writ of Summons filed January 20, 2015 whereby the Plaintiff asserts that the Defendant was summarily terminated on or about February 2013 due to express breaches of employment terms, more specifically, that the Plaintiff was unable to locate deposits and funds had and received by the Defendant in pursuance of her employment terms and as

a result of the said breaches the Plaintiff has suffered loss and damage. The Plaintiff claims inter alia funds had and received during the course of employment in the amount of \$3,780.00 for Unit 15 on January 19, 2013 within receipt #103066; funds had and received during the course of employment in respect of laundry tokens on January 14, 2013 within receipt #14 in the amount of \$194.00; damages for breach; interest; costs and such further or other relief as the Court may seem fit.

2. The Defendant filed her Defence on February 27, 2015 and an Amended Defence on March 4, 2016 denying the Plaintiff's claim and states inter alia that the monies collected by the Defendant was taken to and lodged in the Plaintiff's bank account; that the sum of \$194.00 claimed as unaccounted was located by the Auditor in records which remained in the Defendant's possession following her termination and that the Defendant was denied access to the books and records following her termination and was not allowed to review the accounting records with the Auditors whereby she would have been able to account for the discrepancy consisting of the sum of \$3,780.00 which the Plaintiff now claims as funds not deposited; that the Defendant agreed to meet with Counsel and the Auditors for the Plaintiff to review the books however such meeting did not happen; that the Plaintiff can prove no loss as claimed nor that the Defendant breached her employment or that she failed to account for monies she collected during her employment or at all.
3. The Defendant also counterclaims that the Plaintiff unlawfully caused the Defendant to be locked out of her condominium on April 10, 2014 wrongfully depriving the Plaintiff's (Defendant's) guest and tenant the right to enter and enjoy the use of her unit and as such the Defendant suffered the loss of \$300.00 per month from a roommate who had been renting a room in the unit and claims income from the said rental for one year; payment of notice pay required by her contract of employment and costs.

4. The Plaintiff filed its Reply to Amended Defence and Counterclaim on May 2, 2017 denying the allegations contained in the Amended Defence and puts the Defendant to strict proof as it relates to the allegations contained in the Counterclaim.
5. The Court must consider whether the Defendant received the funds during the course of her employment for which she failed or refused to account for and whether the Plaintiff's action of locking the Defendant's unit resulted in loss of income for the Defendant.
6. I dismiss the Plaintiff's action and the Defendant's Counterclaim for the reasons given below.

### **Statement of Facts**

#### **The Plaintiff**

7. **The Plaintiff** relies on the evidence found in the Witness Statements of Roger Hurst filed November 27, 2017; Helen Lane filed December 4, 2017; Michael Brennen filed December 4, 2017; Pauline Garcia filed December 4, 2017 and Lew Rosengrant filed December 7, 2017.
8. The evidence-in-chief of Ms. Pauline Garcia in part is that she is the Manager of the Plaintiff and that the Defendant was the bookkeeper for the Plaintiff from approximately late 2011 to March 2013. During cross-examination she states in part that her duties consisted of maintaining the grounds, making sure that persons who are assigned to work were where they were supposed to be, ensuring that everything was okay with the houses and reporting to the Board. She also states that she did not have any personal or direct dealings with the accounts and that she would not be able to state whether there was any discrepancy with the accounting and that she is unable to speak to any discrepancy in this matter. She also states that she attempted to arrange meetings with the Defendant and that the Defendant has continued to be uncommunicative, belligerent, uncooperative and argumentative in that she denied that there was any wrongdoing on her part. During re-examination, Ms. Garcia states in part that she did not have any direct dealing with tokens or coins for the laundry as the token funds go directly to the bookkeeper and not her.

9. The evidence-in-chief of Mr. Lew Rosengrant in part is that he is a Board Member of the Plaintiff and that the Defendant was contracted to do the Plaintiff's bookkeeping which included her job duties of which the most important is to collect money and deposit it in the Plaintiff's bank account, pay bills in a timely manner and keep the homeowners house accounts up to date. That during the Defendant's tenure as a bookkeeper, the electricity was turned off several times due to non-payment, even though there was enough money to pay the bills and that the homeowners house accounts were often behind and inaccurate. That cash was not deposited in a timely manner and lumped together making it difficult to keep track of what each deposit consisted of and that the Defendant insisted on working out of her home which she shared with her teenage daughter and not in the office that the Plaintiff provided for her.
10. That in January 2013 on a visit to the Defendant's home to review the Plaintiff's accounts, he was amazed to see that nothing had been filed in any fashion or order; that her kitchen table was cluttered with receipts, invoices, checks and cash, all mixed in with her personal business; that he informed her that she had to organize the Plaintiff's books and keep them separate from her personal business and she promised to comply.
11. That in February 2013 prior to the March Annual General Meeting (AGM), Kathy Pollard and Ron Colvin, two homeowners with business and accounting experience volunteered to do an informal audit of the books, as they had done in previous years. That being a small community with only a few accounting line items and under \$90,000 in income, the Plaintiff's community did not find it necessary to spend \$1,500 on a formal independent audit; that their audit concluded that there was a shortfall of deposited funds against the receipts of collected funds of \$3,818.40 and that the Board of Directors requested that the Defendant meet with the auditors to try and locate the missing funds; that the Defendant reluctantly complied and after several meetings and hours of research, they came to the same conclusion that the receipts given by the Defendant for cash payments received did not match what was deposited with \$3,818.40 being unaccounted for.

12. That at this time the Board of directors informed the Defendant that her service as bookkeeper had to be suspended until the issue was resolved and that they requested that the Defendant continue in good faith to assist the interim bookkeeper and Board members to further investigate all transactions to see if they could find where the money went and that they would continue paying the Defendant giving her the benefit of the doubt that it could have been an honest mistake. That during the following month, the Defendant handed over incomplete records or receipts and deposits, making it very difficult to reconcile the books, that for several months another Board member Helen Lane tried on numerous occasions to meet with the Defendant to attempt to resolve the issue and that the Defendant refused to meet using many excuses including lack of time, sickness and eventually leaving the island leaving no means of contact.
13. That after the March 2014 General Meeting election, Roger Hurst joined the Board of Directors along with Helen Lane and himself and as a result of this Roger Hurst and Helen Lane met often with the manager Pauline Garcia and bookkeeper Mike Acosta. That it became more evident that the Defendant was not going to help resolve the shortage but they were still willing to negotiate an amicable resolution for the Defendant to resolve the shortage by making a repayment plan to reimburse the Plaintiff for the missing funds she was responsible for, but she still refused to cooperate. That it was at this time the Board of Directors sought legal counsel and following this the incoming Board members in 2015 sought to meet with the Defendant in an attempt to resolve this matter but the Defendant had not responded and still had not responded to that date.
14. During cross-examination it was Mr. Rosengrant's evidence in part that he was elected a member of the Board of the Plaintiff since 2005 and still remained a member as at the time of the trial. That when the Plaintiff contracted the Defendant as a bookkeeper the Plaintiff was aware of her limited bookkeeping experience and so the Plaintiff agreed to pay for instruction to help her and they thought she would be a good fit. That it was not surprising to the Plaintiff that due to the Plaintiff's limited bookkeeping experience that the homeowners' house

accounts were often behind and inaccurate, cash not deposited in a timely manner and lumped together making it difficult to keep track of what was deposited. That the informal audit to which he spoke about was done by two homeowners who had bookkeeping experience and business experience and offered their services for free to review and see if everything was entered appropriately, bring up any questions that the Board would then go forward to try to correct or seek answers to any questions, that it was a preliminary audit and after they would move forward and have a professional audit done.

15. That the professional audit was done by Michael Acosta who had been in business for many years but that his audit was not an independent audit. That the exercise done by the two homeowners was not an audit but a review and that on occasion they would do a written report which would be recommendations going forward and that the Board did take their consideration and change things. That he was not in possession of the report as at that time but that the Board has it in their files and that the two homeowners were given the records and receipts that were given by the bookkeeper to do their review.
16. That he saw the said receipts and deposit tickets and after the two homeowners brought to their attention the issue, they hired Mike Acosta to do a more formal accounting of their books and he came up with the same conclusion. That he did not do the accounting, so he is unable to speak to that. That at the time of the Defendant's suspension the Board believed that the discrepancy could have been a mistake and that they sought to get all of the records from the Defendant; that he looked through the records the Board received such as the receipts and the cheque book but he did not have much accounting experience. That he had no direct knowledge concerning the meetings with Pauline Garcia, Michael Acosta, Roger Hurst and Helen Lane as he was not present during them.
17. That at the point the Plaintiff sought to negotiate an amicable resolution with the Defendant they were sure that the funds were missing and that was based on the information he received from Michael Acosta and the two homeowners. That there was a possibility that there may have been errors that led to the discrepancy and

not that money was missing and that they never accused the Defendant of taking the money, their position was that it had to be misplaced or missing and that they were not responsible for it, the Defendant was.

18. That during re-examination Mr. Rosengrant stated in part that Michael Acosta became the bookkeeper and took over after the Defendant; that he attempted to reconcile all of the information that he was given; that the Board had receipts for the funds received but they did not have the deposit tickets to show that they were deposited into the Plaintiff bank account; that the bank account does not show a deposit for the missing funds but accepts that the funds may have been posted in the wrong place, could not be reconciled but not necessarily misappropriated.
19. The evidence-in-chief of Helen Lane in part is that she became a member of the Board in March 2013 and that at that time it was brought to her attention that a cash deposit of \$3,814.40 was not accounted for. That she spoke to Kathy Pollard about the unaccounted funds and that Kathy Pollard was pleased that someone was concerned about the missing cash deposit that was never credited to the Plaintiff's Royal Bank of Canada bank account. That she tried to meet with the Defendant on numerous occasions to try to resolve the money not accounted for after spending time going over the receipts and deposits and that she could not locate the deposit credited to the Plaintiff bank account.
20. That the Defendant told her during her first attempt to meet with the Defendant that the Defendant was in the middle of exams and it would have to wait and the other time both her and the Defendant were traveling and to let her know when they would be able to get together, but the Defendant never got back to her. That the Defendant kept giving her excuses every time she would ask for a chance to get together. That the Defendant disappeared for a year and she could not reach the Defendant by phone or e-mail and that she had no way of making contact with her. That sometime after she met with Mr. Stephen Wilchombe to get advice on how to locate the Defendant and sometime after he was able to locate her. That Mr. Wilchombe put a lien on her house to cover her outstanding maintenance

fees, but they still had not heard anything from the Defendant. That it was only after she was advised by Mr. Wilchcombe to lock the Defendant out of her house that the Defendant reappeared on the island.

21. During cross-examination Ms. Lane's evidence in part was that she could not exactly remember who said that the money was missing but it was brought to her attention that it was missing and that she spent days going through all of the paperwork to see where the funds were and kept coming up with the same thing. That her wanting to meet with the Defendant was to try and locate the deposit so that the problem could be resolved and to find out what happened from the time the money was received and signed for and it appeared that it was not in the bank account. That she was looking to try and find that amount of funds, however it was deposited and the sum of three thousand plus dollars represented a maintenance fee and a small amount that was with the maintenance fee. That she never provided the Defendant with any documents as she was unable to meet with the Defendant.
22. That she was advised to place a lock on the Defendant's unit and after that was done the Defendant appeared with the police and advised them that they had to remove the lock. That they only placed the lock on the Defendant's unit because of the advice received from Mr. Wilchcombe. That she did not believe there could be errors in the accounting that resulted in the discrepancy as from what she could see going through all of the receipts and deposits it came back to the same thing, a maintenance fee and a small fee. That she assumed that the person who was doing the books would have the receipts and that at the time there were two or three maintenance fees that were paid in cash but there was only one missing that was not deposited to the Plaintiff bank account. That the owners would get receipts when they paid their maintenance fees but she would not know when the money would be deposited into the Plaintiff bank account.
23. That she remembers or thinks that one of the cash deposits was from House No. 15, Mike Brennan and House No. 7, Ron Colvin and she thinks that they were the two people that had cash receipts. That she came by the receipts by the person



who was doing the accounts at the time Michael Acosta. That at that time they were going through everything and they could see where a cash deposit for a maintenance fee was made and another one was never deposited but she could not remember the exact deposits at this time. However, she stated that the person who did the audit said the funds were missing. That she was present during the AGM meeting on March 2, 2014 and that the Defendant was also present. That although the Defendant was present during the same AGM it was not her place to bring up the issue of the missing funds if it was not agreed by the Board that they should.

24. During re-examination, Ms. Lane's evidence in part is that the lock was placed on the Defendant's door due to delinquent maintenance fees and not the bookkeeping issue and that her maintenance fees was delinquent for more than a year. That she felt as a Board Member they were responsible to try and locate funds that were given to someone that was doing the books to deposit into the Plaintiff bank account. That the three outstanding items as of December 31, 2013 as stated in the AGM notes dated March 2014 by Michael Accosta were maintenance receipt 103066 in the amount of \$3,780 not deposited dated January 19, 2013 for Number 15, Brennan; receipt 14194 laundry coins not deposited dated January 31, 2013; receipt 103113 in the amount of \$149.00 not deposited until January 6, 2014. That during that AGM meeting the Defendant did not meet with anyone.
25. The evidence-in-chief of Roger Hurst in part is that he was elected to the Plaintiff's Board of Directors in 2014 along with Mr. Lew Rosengrant and Mrs. Helen Lane and that Mrs. Pauline Garcia remained as manager and Mr. Mike Acosta as bookkeeper. That at that time he was made aware of the \$3,818.40 shortfall in the Plaintiff accounts and that the money to that amount had been collected and received but had not been paid to the Plaintiff bank account. That he was informed that all of the attempts to reach the former bookkeeper, the Defendant to account for the missing funds had been unsuccessful. That he wrote a letter on July 15, 2014 asking for a meeting with the Defendant and the Board to account for the shortfall but no reply to his letter which was sent via e-mail and hand delivered to

the Defendant was received. That since that date he has been involved along with the other Board members in attempts to communicate with the Defendant.

26. During cross-examination his evidence in part is that he was advised by the Plaintiff's auditors Mr. Ronal Colvin and Kathy Pollard of the shortfall. That he did not see any records that showed the shortfall but was only told about the shortfall. That he was informed by the previous and existing Board members that there was an issue initially in particular Mr. Mike Brennan, Mrs. Helen Lane and Mr. Lew Rosengrant. That he had access to the funds and that he is not a financial person.
27. During re-examination his evidence in part is that Ron Colvin and Kathy Pollard undertook to carry out an audit of the apartment and they found a shortfall of \$3,000. That they could see the funds coming in but not where they were deposited and that this was in the report. That he would have heard the same from Ron Colvin and Kathy Pollard and the bookkeeper. That attempts were made by the Board to resolve the situation but there was no response.
28. The evidence-in-chief of Michael Brennen in part is that he was not on the Plaintiff Board of Directors when the matter started nor when the lock out incident occurred. That he was voted on the Board around March 2015 and that on or about October 2015 to January 2016 he spoke with the Defendant on five separate occasions via telephone attempting to resolve the matter, but she refused to do so.
29. During cross-examination his evidence in part is that he was informed by the other Board members and bookkeeper of the matter and they were trying to communicate with the Defendant but had problems doing so. That he volunteered to get in contact with the Defendant as he and the Defendant previously served on the Board together. That after refusing to meet with the Board to resolve the matter he told her that they were proceeding with the court proceedings and that it would cost a lot of money, legal fees and the money it would cost them to collect was going to be put on her account. That in his discussions with the Defendant she never told him that the money was missing. That he saw the auditor's report that was done by Ron Colvin and Kathy Pollard where the money was initially

noticed as missing, the statements from the bookkeeper, Mike Acosta and the discussions with the Board members during the Board meetings. That he never saw the receipts to which the Plaintiff alleges evidences the money that was missing.

30. During re-examination his evidence in part is that the nature of his discussion with the Defendant was just to have a discussion with the Defendant but not an in depth discussion concerning the funds. That his is a retiree but he was a systems tech previously but he is not an accountant.

### **The Defendant**

31. **The Defendant's** evidence, in part, is contained in her Witness Statement filed January 25, 2018 and is that she is the owner of Unit 18, a condominium apartment located in German Holiday Park located in Freeport, Grand Bahama. That she was employed by the Plaintiff as a bookkeeper from July 2011 to March 2, 2013 at a monthly rate of \$500.00 and that her duties included but was not limited to collecting, recording and depositing monies to the Plaintiff's bank account, keeping homeowners accounts up to date, paying utility bills, preparing reports and assisting the Manager when the need arose. That she denies the Plaintiff's allegations and that she carried out normal bookkeeping practices and procedures. That all monies were collected by herself and deposited into the Plaintiff's bank account and that under Mike Acosta's advisement she used cash on hand to cash payroll checks and petty cash and that it was usual that if a homeowner wanted to cash a cheque that she used the cash on hand to do so and would give the homeowner a receipt for the cash and would then add the cheque to the remaining cash and/or cheque on hand. That she would also record on the bank slip the unit of the unit owner presenting the cheque which was cashed onto the bank slip to be deposited to the bank and that this method of cash on hand to cash payroll checks and petty cash made it difficult to decipher where the cash was if the bookkeeper was not involved. That she was summarily dismissed on March 2, 2013 and that after the AGM she met with the Board and was told she was being relieved of her duties and her services no longer needed. That at no time was she informed

there was an issue with her performance nor was she questioned about any missing funds. That the accounting books were removed from her possession following her dismissal and there was never a turnover meeting whereby she could properly transfer information and answer questions or possible discrepancies.

32. That she was unable to decipher where the alleged missing funds may have been located without being able to physically review the books. That she had always been willing to review the accounts and that in May, 2013 when Helen Lane advised her that certain funds could not be located she advised her that she would be able to review the books after she finished her exams in June however in June Mrs. Lane and her husband was away. That in August 2013 she travelled to New Providence and was not on Grand Bahama for a year and that while in Nassau in November 2013 she was contacted by Mr. Stephen Wilchcombe, the Plaintiff's former attorney who advised her that she was needed to review the books. That she told him she would be in Grand Bahama for the holidays and upon her arrival she was aggressively approached by one of the homeowners and subsequently left shortly thereafter. That sometime on April 10, 2014 the Plaintiff placed a padlock on her unit and that she received an email in July 2014 requesting to meet to review the accounts but at that time she was in the United States attending a family funeral. That a copy of the same email was placed at her residence sometime in September 2014 and she subsequently contacted Roger Hurst to advise him that she was prepared to meet with the Plaintiff Board to review the books once Kathy Pollard and Ron Colvin returned to the Bahamas and she communicated the same to Lew Rosengrant.
33. That in October 2014 she received a demand letter from the Plaintiff's Attorney and attempted to make an appointment to review the books. That she was advised at that meeting by the Plaintiff's Attorney that the Plaintiff decided to have the matter resolved by the Courts and during that meeting she was not given an opportunity to review the books or audit or provide an explanation to any items listed on any of the documents. That since her termination she became aware of a previous occasion of a similar discrepancy and she feels that this is a personal

attack as she has been denied access to the books and taken through an unnecessary court process.

34. That she was aware that the \$194.00 alleged to have been unaccounted for was located by the auditor Kathy Pollard. That at no time during her tenure she misappropriated any funds and does not owe the Plaintiff any funds and that she carried out her duties to the best of her ability and as far as she knew all the monies had been accounted.
35. She further states that she believes she was wrongfully terminated and seeks compensation under the Employment Act and she seeks one month's notice and two weeks for each year of service amounting to \$916.67. That in April 2014 she allowed a guest/tenant to stay in one of the bedrooms in her unit and it was intended that the rental arrangement would have been for a year at a monthly rent of \$300.00 per month. That sometime on April 10, 2014 she was informed by her tenant that a padlock had been placed on her unit and access to her home was prohibited. That the Plaintiff infringed on her enjoyment of her unit and right of entry to it and as such that action frightened her tenant and she immediately moved out. That she had to return to Grand Bahama and seek the assistance of the police to gain entry to her home.
36. During cross-examination her evidence in part is that she had no official training as a bookkeeper from any institution but was trained in Quick Books unofficially. That did not recall the lady's name who trained her, but she received some training from a couple of persons who worked in Quick Books like her mother, a lady named Christine and a lady named Monique. That the training was paid for by the Plaintiff and friends assisted her and that primarily she worked out of her unit following suit of the previous bookkeeper. That she did basic accounting procedures like writing up receipts, making deposits to the bank, paying utilities, balancing the house accounts, making payments to the phone company. That the procedures she referred to in her evidence-in-chief were those related to Quick Books like how to enter certain things. That she would ensure that if a deposit was made there was a correlation receipt and accounting provided for it.

37. That she did not notice any missing funds as there were no funds that was missing and that she does not have the audit report. That she requested a reason via email as to why a padlock had been placed on her unit but was not given an answer and when she returned to Grand Bahama she called the police. That she made efforts to talk to the Board Members and she did not evade anyone. That she did not have an answer as to why she did not bring an action before the Department of Labour regarding her claim that the Plaintiff wrongfully terminated her. That there was a woman that rented a room in her house and that according to the Rules, the Plaintiff Board would only get an application when someone is renting the entire unit but she was only taking on a roommate. That there were no provisions for a roommate type of situation. That she paid her condominium fees, but they were not paid in full as at April 10, 2014. That she had air-marked the rent she was going to receive to go towards paying the condominium fees but because they locked the tenant out she lost the money. That at the time she made herself available and was not given an opportunity to have a look at the books to date.
38. During re-examination her evidence in part is that at that time she had not received a copy of any of the receipts of the slips to which the Plaintiff refers to and that her intention in December to attend the office of Counsel for the Plaintiff was to have a look at the books and information presented to her but that never happened. That she never misappropriated or have any dealing with un-deposited funds and at the time of her termination she did not receive any severance pay nor has she received any severance pay to date.

### **Submissions**

39. The Defendant relies on her Written Submissions filed on February 21, 2020 and submits in part that the facts before the Court are grounded in contract law and states that the burden of proof lies with the one who asserts and as such, he who asserts must achieve a standard of proof on the balance of probabilities.
40. Mrs. McIntosh-Pelecanos, Counsel for the Defendant submits that upon perusal of the Plaintiff's List of Documents and Bundle of Documents, the Plaintiff did not list nor produce any receipts, bank statements, cheques or audit reports needed to

prove their claim. Therefore, it is her submission that the Plaintiff is deficient in meeting the minimal burden of proof. Mrs. McIntosh-Pelecanos also refers the Court to an exchange between Counsel for the Plaintiff and Defendant and the Court on October 29, 2018 at page 7 of the transcript relating to the Plaintiff's failure to provide the aforementioned documents.

41. It is also her submission that during the trial, the Plaintiff's witnesses were unable to provide any documents or records of the proof of the allegations; that the witnesses do not have any professional accounting knowledge nor did they have any direct dealings with the accounts and refers the Court to the evidence of Pauline Garcia, Lew Rosengrant, Helen Lane, Roger Hurst and Michael Brennen.
42. Mrs. McIntosh-Pelecanos submits that the Defendant has maintained throughout her Defence that she did not move any money from the Plaintiff and that the Defendant admitted that she did not have any formal training as a bookkeeper. It is her submission that the Plaintiff sought to rely on an audit report as the basis of its allegations against the Defendant but failed to produce the same. She submits that the only document presented to the Court was of notes from an AGM whereby the "auditor" Mike Acosta concluded there were inputting errors that caused the discrepancies and as such Mr. Acosta was not presented to the Court as a witness. Therefore, she submits that the Plaintiff has failed to provide any evidence of missing money in the amount claimed or at all.
43. Counsel for the Defendant also submits that the Defendant has proven her Counterclaim against the Plaintiff for loss of rent and severance pay. She submits that the Plaintiff's witness Helen Lane admitted that the Plaintiff put a lock on the Defendant's unit and was instructed to remove the same. Mrs. McIntosh-Pelecanos submits that such action was wrong and Mrs. Lane's evidence that it was done because the Plaintiff could not find the Defendant makes the action more egregious. It is her submission that the Plaintiff lost a renter and thus rental income, and that the Plaintiff did not challenge the Defendant's claim for this loss. She further submits that the Plaintiff did not produce any rules regarding the rental and the Defendant denied that she was in contravention of the same.

44. It is also her submission that the Plaintiff did not deny that the Defendant was terminated or that she did not receive severance pay from the Plaintiff and as such the Plaintiff's actions would suggest that they summarily dismissed the Defendant. She submits that the Plaintiff wrongfully terminated the Defendant and refers the Court to Section 29 of the Employment Act. Mrs. McIntosh-Pelecanos states that the evidence provided by the Plaintiff in this action was that the Plaintiff did not have any records to assert that any wrongdoing was done by the Defendant and the evidence of their own auditor (that any discrepancy would have been as a result of inputting errors) was contrary to their case. She further submits that to succeed on a claim for summary dismissal the employer must have had a reasonable belief that the employee conducted the act complained of and therefore in the instant case there is no reasonable basis for the Plaintiff to believe that the Defendant conducted any wrongdoing as there was no evidence to support the same.
45. Counsel for the Plaintiff, Mrs. Tiffany Dennison relies on her Written Submissions in support of the Plaintiff's claim. She submits that the transcript shows all the evidence of members of the Board of the Plaintiff; their consistency in attempting to settle the matter prior to any court matter; the Defendant's attempts to avoid the Board to settle the matter or to go through accounts with the relevant parties to ascertain where the funds were provided to. It is Mrs. Dennison's contention that if a mistake was made on the accounts that the Defendant could clarify the same. However, she submits that it appears in the evidence and the transcripts that attempts to evade or be obtuse with the Board members avails that these funds may well have been misappropriated.
46. Mrs. Dennison submits that the Defence only called one witness when the Plaintiff was able to provide numerous witnesses who all had the same experience in trying to deal with the Defendant and resolve the matter of missing funds. It is her submission that it was reasonable for the Plaintiff, as employer of the Defendant to expect to work in the office and not from her home, to answer to the employer who paid for her to be educated and learn Quick Books. She states that this



evidences the Plaintiff's further attempts to settle and utter leniency and that the Plaintiff did not seek to hurt the Defendant but sought to regain what the Plaintiff said was a responsibility to the Unit Owners as Board members under the Act. Moreover, she submits, rather than mitigate the losses of the Plaintiff Association, the Board of Directors, fellow unit owners and herself, the Defendant has escalated the matter.

47. Further, Mrs. Dennison submits the evidence shows that the lien placed by previous counsel Mr. Wilchcombe was due to lack of payment of service charges by the Defendant, who again refused to respond to the Plaintiff on the same, until locked out and it was then, and only then that the Defendant returned to the island to regain entrance. Additionally, it is Mrs. Dennison's submission that the Defendant did not seek Board approval for renting the unit, and did not provide funds from the rental to the Plaintiff for service charges on Common Properties that the Defendant's tenant enjoyed. This is evidenced by the Defendant herself as well as the Plaintiff and she submits illustrates the Defendant's attempts to evade the Board for her breaches of employment and as unit owner.
48. Mrs. Dennison submits that it was an express term of the employment of the Defendant as a bookkeeper to keep straight all funds had and received and allocate to the correct house account or the bank reconciliations or Board, as necessary. She further submits that the Court has heard that funds for a deposit has been misplaced, as evidenced by letters, reports and AGM minutes, with the Defendant present and that the Defendant, despite the best efforts of the Plaintiff, had failed and or refuses to meet with the Board and accountants to seek to resolve the same. Moreover, she submits that coins for washroom tokens were also missing from the accounts and the bookkeeping of the Defendant. It is her submission that this also amounts to a theft by reason of employment or at the least gross incompetence.
49. In response to the Defendant's Counterclaim, Mrs. Dennison submits that the Defendant not only has not met with the Board in two years to resolve the matter, but she has evaded their contact, refused to meet and abide by the rules of the

Association for renting. Additionally, she submits that being that the Defendant did not meet with the Plaintiff and was not apparently on island and not paying her dues, the Plaintiff sought to place a lien on the empty unit and lock the same. She further submits that the Plaintiff would not have known that the Defendant rented the unit as no application was filled out and approved for the same and no rental fee paid per the rules under the Declaration. It is her submission that as a unit owner and an employee of the Association, it is absurd to believe that the Defendant was not aware of such an application for rentals to be approved and states that this is trite/commonplace, and all condominiums follow this procedure for rental approvals and application costs.

50. She also submits that the Defendant has shown no rental income or loss as she has counterclaimed, thus her set off claim cannot stand without any evidence of a rental or roommate provided to the Courts or approvals by the Association. She further submits that the Defendant remained defensive under cross examination appearing angry whilst the Plaintiffs witnesses were calm and worked well even with the opposition under cross examination, continuing to express concern for the Defendant and the Unit owners they bear responsibility for. Mrs. Dennison also states that the Defendant claims damages due to being locked out of her unit. However, as evidenced this was under the relevant Act for delinquencies of maintenance and the lien placed on the same by then counsel Stephen Wilchcombe. It is her submission that there remains a duty of the Board Members to the Unit owners for accounting and to pursue delinquencies in maintenance as well as duties of employees especially money accounting for each unit owners' fees and tokens for the wash facility.

### **Issues**

51. The issues for the Court to consider is :-

- a. whether the Defendant received the funds during the course of her employment for which she failed or refused to account for;
- b. whether the Plaintiff's action of locking the Defendant's unit resulted in loss of income for the Defendant.

## **Analysis & Disposition**

52. It is trite law that he who alleges must prove and in my judgment, based on the foregoing, the Plaintiff has failed to prove the allegations as pleaded in its Writ of Summons namely that due to express breaches of the employment terms of the Defendant's contract with the Plaintiff, the Plaintiff was unable to locate deposits and funds had and received by the Defendant in pursuance of her employment terms; that the Defendant has failed and or refused to account for the funds unallocated or meet with the Plaintiff to review the accounts and that as a result of the alleged breaches suffered loss and damage. As I understand the Plaintiff's case the Plaintiff's action is for recovery of funds had and received by the Defendant through her employment with the Plaintiff in particular funds in the amount of \$3,780.00 for Unit 15 on January 19, 2013 relating to receipt #103066 and the amount of \$194.00 for laundry tokens on January 14, 2013 relating to receipt #14.
53. In the instant case the burden of proof lies on the Plaintiff to prove on a balance of probabilities that the Defendant firstly received the funds relating to the two receipts identified in the Plaintiff's Writ of Summons and that Defendant failed to account for the same. Moreover, upon reading of the Plaintiff's Writ of Summons I find that the Plaintiff has failed to plead the express breaches committed by the Defendant in contravention of her employment terms with the Plaintiff.
54. In the instant case, the Plaintiff has not adduced the evidence or any evidence before the Court as pleaded in its Writ of Summons, in particular copies of receipt #103066 for Unit 15 dated January 19, 2013 for the sum of \$3,780.00 and receipt #14 for laundry tokens dated January 14, 2013 in the sum of \$194.00. Moreover, the evidence on which the Plaintiff relies in support of the claim has only been the evidence of its witnesses as contained in their Witness Statements and during cross examination. The evidence provided to the Court by these witnesses were similar in that the basis of the allegations before the Court arose from either reviewing the said receipts, an audit report and/or review report or was informed

by previous Board Members of the Plaintiff. However, these documents i.e. the said receipts, audit report and/or review report were never produced before the Court. These documents were not adduced into evidence whether by the Plaintiff's witnesses nor were they included in the Plaintiff's Bundle of Documents. In my view the Plaintiff ought to have been able to produce copies of the receipts and any other document it sought to rely on to establish the allegations as contained in its Writ of Summons.

55. Moreover, as the evidence before the Court by the Plaintiff's witnesses was that following the termination of the Defendant, two home-owners Ron Colvin and Kathy Pollard conducted an informal review whereby a report was produced and Michael Acosta, the succeeding bookkeeper conducted a "formal" audit whereby a report was produced, I find it curious that these reports were not produced before the Court, neither were the makers of the said reports brought to give evidence to establish the same.
56. Having regard to the Plaintiff's pleaded case and the evidence before the Court, I accept Counsel for the Defendant's submission that the Plaintiff has failed to provide any evidence before the Court that the Defendant had and received the said sums of the amount claimed or at all and that any money was missing and dismiss the Plaintiff's case.
57. The Defendant by virtue of her Counterclaim seeks the loss income from the rental of a room in her unit in the amount of \$300.00 for one year and payment of notice pay required by her contract of employment.
58. It is not disputed between the parties that the Plaintiff placed a lock on the Defendant's unit sometime in April 2014. To my mind whether such action committed by the Plaintiff was done as a result of the Defendant's failure to remain current with her condominium fees is not the issue before the Court. The Defendant in her Counterclaim pleads that the Plaintiff at that time had no prior right arising out of the by-laws of the Condominium and as such wrongly deprived the Plaintiff and her guest/tenant the right to enter and enjoy the use of her unit. It is my understanding that the Defendant's claim in this regard is not for damages

relating to the deprivation of the enjoyment of the use of her unit but for loss of rental income.

59. Regrettably, similar to the Plaintiff's case before the Court, the Defendant's evidence in support of her claim for loss of rental income is woefully lacking. The Defendant's only evidence in support of this part of her Counterclaim is found at paragraphs 20 and 21 of her Witness Statement whereby she states that the intended rental arrangement was to be for a year at a monthly rent of \$300.00 to which she claims the loss of the yearly rent in the amount of \$3,600.00. It seems to me that it would not have been difficult for the Defendant to produce documentary evidence in support of this claim, i.e. the rental agreement or the evidence of the tenant who had been renting from the Defendant at that time. Therefore, in the absence of the aforesaid evidence this part of the Defendant's Counterclaim fails.
60. The Defendant's second claim in her Counterclaim is for the payment of notice pay required by her contract of employment. Counsel for the Defendant in her submissions stated that the Plaintiff wrongfully terminated the Defendant and as such referred the Court to Section 29 of the Employment Act. Moreover, the Defendant in her Witness Statement at paragraph 19 states that she was wrongfully terminated and seeks compensation pursuant to the Employment Act in the amount of \$916.67 representing one month's notice pay and two weeks for each year of service.
61. It is not disputed between the parties that the Defendant was summarily dismissed by the Plaintiff sometime in February or March 2013. However, having regard to the Defendant's pleaded case in her Counterclaim, nowhere in her Counterclaim does the Defendant say that she was wrongfully terminated by the Plaintiff, that she suffered loss and damage as a result of such and quantified her loss as such loss would be a liquidated sum. While the Defendant's evidence as contained in her Witness Statement at paragraph 19 was not challenged by the Plaintiff and Counsel for the Defendant has made submissions on this part of the Defendant's Counterclaim, the Court makes the observation that submissions do not rise to the

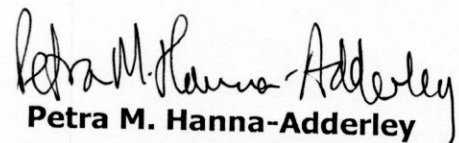
level of pleadings. Therefore, in my judgment, the Defendant failing to plead any allegations of any breach against the Plaintiff arising out of her termination the Defendant's Counterclaim must be dismissed.

62. In the result, the cases of both parties are dismissed.

63. While Counsel for the Defendant has made submissions on the issue of costs and states that the Plaintiff's decision to commence proceedings in the Supreme Court instead of the Magistrate's Court amounts to an abuse of process as it could have been dealt with in the Magistrate's Court, it would be remiss of me to remind Counsel that the Supreme Court is a Court of unlimited jurisdiction and as such there is nothing to prohibit any party from bringing an action for any amount to which they seek redress.

64. Considering the decision to which I have arrived, as the Plaintiff's claim was dismissed the Plaintiff is to pay the Defendant's costs of the Plaintiff's claim to be taxed if not agreed. As the Defendant's Counterclaim was dismissed the Defendant is to pay the Plaintiff's cost in defending the Counterclaim to be taxed if not agreed.

Dated this 24<sup>th</sup> day of December, A. D. 2020

  
**Petra M. Hanna-Adderley**  
**Justice**