

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT NUCHOW,
Appellant,
vs.
SAN GENNARO, INC., A NEVADA
CORPORATION D/B/A SAN GENNARO
CAFE; AND JOHN JAY HANDAL,
INDIVIDUALLY,
Respondents.

No. 43098

FILED

FEB 13 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment after a bench trial in a contract action. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Corporate officer as employee

Nuchow contends that he was an employee of San Gennaro and entitled to wages, despite the fact that he was an investor in the restaurant and a director of the corporation. We disagree.

For an officer or director of a corporation to be compensated as an employee "for gratuitous services within the scope of his official duty rendered to the corporation during his term as a director," there must be an "express prearrangement for such compensation."¹ However, if performing duties "separate and distinct from those pertaining to his office," a corporate officer can simultaneously be an employee of a corporation when "employed under a definite contract to render specified services at a stated wage or hire."² Since "an officer of a corporation

¹Rocky Mt. Powder Co. v. Hamlin, 73 Nev. 87, 90-91, 310 P.2d 404, 406 (1957).

²Shriver v. Carlin & Fulton Co., 141 A. 434, 438 (Md. 1928).

occupies a fiduciary relationship, his dealings with the corporation should be scanned critically when he asserts a claim” for services not incident to his duties as an officer.³

Substantial evidence supports the district court’s finding that the parties orally agreed to share profits, allowing Nuchow to pay himself \$50 to \$100 per day after all the expenditures for the restaurant were paid. The record on appeal contains no evidence of an express or implied contract for hire that would support a finding that Nuchow was employed for wages.⁴

Compensation for services

Nuchow contends that Handal may not raise the unprofitability of the restaurant as a defense to payment of wages, especially where the lack of profit was due to Handal’s own breach of contract to properly fund and manage the business. We disagree.

Under NRS 78.140(4), “[u]nless otherwise provided in the articles of incorporation or the bylaws, the board of directors [of a corporation] . . . may establish the compensation of directors for services in any capacity.”

The district court found that the parties entered into an oral contract that provided that Nuchow could pay himself \$50 to \$100 per day after all the expenses of operating the restaurant were covered. The district court found that this condition precedent was never met in the

³Talbot v. Nevada Fire Insurance Co., 52 Nev. 145, 148-49, 283 P. 404, 405 (1930) (citations omitted) (holding that an officer of a corporation was entitled to compensation pursuant to express contract to earn a salary and a share of profits for services rendered).

⁴Keife v. Logan, 119 Nev. 372, 75 P.3d 357 (2003).

fifteen months that the restaurant was open, but made no finding on the reasons why the restaurant was not profitable. Therefore, the district court concluded that Nuchow was not entitled to recover wages under the terms of the contract. Because there is no evidence in the record on appeal to contradict the district court's determination, we will not disturb these findings.⁵

Quantum meruit

Nuchow contends that even if he is not entitled to compensation based on an express contract of employment, the district court erred in not finding that he was entitled to recover under a theory of quantum meruit. We disagree.

This court has held that "an action does not lie on an implied contract where there exists between the parties an express contract covering the same subject matter."⁶ But "when an express agreement cannot be found or provisions for payment are uncertain, . . . a recovery in quantum meruit may be allowed if necessary to prevent unjust enrichment."⁷ Therefore, a director or officer of a corporation may recover compensation from the company for services which are outside the scope of his or her official duties where "an implied promise can be inferred from the circumstances of the case."⁸

Substantial evidence supports the district court's finding that Nuchow and Handal had an express agreement as to the type of

⁵Lindauer v. Allen, 85 Nev. 430, 456 P.2d 851 (1969).

⁶Ewing v. Sargent, 87 Nev. 74, 80, 482 P.2d 819, 823 (1971).

⁷Id. at 79-80, 482 P.2d at 823.

⁸Rocky Mt. Powder Co., 73 Nev. at 91, 310 P.2d at 406.

compensation Nuchow would be entitled to receive for his services as manager of the restaurant. No other promise, implied or otherwise, was found. Thus, Nuchow was not entitled to compensation under the theory of quantum meruit.

Alter ego

Nuchow contends that the district court erred in declining to consider his alter ego claim after the findings of fact established the claim as a matter of law. We disagree.

NRS 78.747(1) states that unless otherwise provided by specific statute, "no stockholder, director or officer of a corporation is individually liable for a debt or liability of the corporation, unless [he or she] acts as the alter ego of the corporation." "[T]he 'essence' of the alter ego doctrine is to 'do justice' whenever it appears that the protections provided by the corporate form are being abused."⁹ "The question of whether a stockholder, director or officer acts as the alter ego of a corporation must be determined by the court as a matter of law."¹⁰

⁹LFC Mktg. Group, Inc. v. Loomis, 116 Nev. 896, 903, 8 P.3d 841, 845-46 (2000) (quoting Polaris Industrial Corp. v. Kaplan, 103 Nev. 598, 603, 747 P.2d 884, 888 (1987)).

¹⁰NRS 78.747(3).

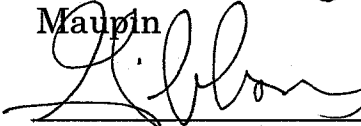
Because Nuchow does not include the trial transcripts from the proceedings below, this court is unable to re-examine the district court's determination as to his claims regarding alter ego.¹¹

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

cc: Hon. Valerie Adair, District Judge
Karl M. Manheim
Vincent J. Kostiw & Associates
John Jay Handal
Clark County Clerk

¹¹Toigo v. Toigo, 109 Nev. 350, 849 P.2d 259 (1993).