Citation: *37504 Yukon Inc. (Sam n' Andy's) v. 46249 Yukon Inc.,* 2014 YKSM 4

Date: 20140305
Docket: 13-S0045
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before: His Honour Judge Chisholm

37504 YUKON INC. doing business
as SAM N' ANDY'S

Plaintiff

v.

46249 YUKON INC.

Defendant

Appearances:
Sharon Caron and Ann Caron — Appearing on behalf of Plaintiff
Grant Macdonald, Q.C. — Counsel for Defendant

REASONS FOR JUDGMENT

Nature of the Claim

[1] The parties to this action are in a commercial landlord and tenant relationship. The commercial lease is with respect to a building located at 506 Main Street in Whitehorse (the 'premises') in which the Plaintiff operates a restaurant under the name Sam n' Andy's. This action arises as a result of the Plaintiff tenant, having to close its restaurant for a day and a half in order for a sewer pipe to be unearthed and replaced.

[2] The Plaintiff alleges the Defendant breached the commercial lease and seeks damages primarily for loss of business, but additionally for various

expenses incurred as a result of this incident.

Relevant Facts

[3] The Plaintiff is represented by Ms. Sharon Caron and Ms. Ann Caron. As principals of the Plaintiff company, they have leased the premises since 2004 on behalf of the Plaintiff and, during that period of time, there have been three different landlords. The Defendant purchased the premises and became owner effective December 1, 2012. An existing lease agreement with respect to the premises was assigned to the Defendant.

[4] The Carons were diligent to ensure that there were no problems with the sewer line. They maintained a grease trap which prevented grease from entering the line and potentially clogging it. They made certain that food and grease did not enter the sewer line for fear that it would create an obstacle through which water could not pass.

[5] They paid attention to this because in 2005, a sewage back-up occurred which resulted in a section of piping having to be replaced. Since that time the line has been 'steamed' either once or twice a year by the respective landlord. Subsequent to the installation of the replacement section of pipe, no problems had been encountered prior to the incident which forms the basis of the Plaintiff's claim. When selling the premises in 2012, the former owner/landlord disclosed to potential buyers, by way of a disclosure letter dated October 11, 2012, the following:

> In regards to the steaming of the main city line, the reason we have it steamed out every year is for preventative measures so there is no issue with the grease trap. The previous owners replaced the pipe and they put in a slightly smaller size, therefor (sic) to prevent any ongoing backups, we have the line steamed yearly. We do not have any knowledge of backups since we took over ownership.

[6] On May 31, 2013, Ann Caron noted some issue around the grease trap. She arranged to have a commercial cleaner come to vacuum out the pipe. The following day, she ran into Wayne Yim, a principal of the Defendant company, who was picking up the rent cheque. She advised him about the grease trap and suggested it might be time to consider having it 'steamed'. She indicated that she and her sister (Sharon Caron) would monitor the situation and advise him if it worsened.

[7] On June 11, 2013, further problems were encountered. Ann Caron contacted Mr. Yim to advise him the annual pipe maintenance should occur. Mr. Yim, in turn, contacted Mr. Gonder who had done this work annually and arranged to have him attend the premises the next day. On June 12th, Mr. Gonder performed the 'steaming' work without success. Mr. Yim subsequently authorized him to use a snake to rectify the blockage. This too was unsuccessful. Mr. Gonder suggested that the City of Whitehorse maintenance personnel be brought in with a mini-camera to determine the cause of the blockage. When this was done, it became apparent that there were structural problems with the pipe.

[8] Due to the efforts of Sharon and Ann Caron, it was arranged for a local

backhoe service to attend to meet with them and Mr. Yim. This meeting occurred on the morning of June 13th. After assessing the situation, the owner of the backhoe service made some schedule changes for that day and freed up one of his machines. The piece of pipe unearthed was very old and had effectively collapsed in one spot, where it had filled with rocks and dirt. When the work had been done in 2005, this section of the pipe, which was underneath the front deck, had not been replaced.

[9] The backhoe company removed and replaced the pipe. The deck was put back in place and by noon on June 14th, the restaurant was open for business after a day-and-a-half closure.

Position of the Parties

[10] The Plaintiff's argument, simply put, is that the Defendant breached certain terms of the lease. The Plaintiff argues that, pursuant to the lease, the defective pipe should have been replaced by the Defendant prior to this issue arising. The shutdown of the business resulted in an interference with the quiet enjoyment of the premises and a consequent loss of business. As the pipe was not repaired, the resulting difficulties cost the Plaintiff a significant amount of money due to the closure of the business. Once it was reopened, the restaurant was unable to operate at full capacity for a number of days.

[11] The Defendant argues there was no breach of contract (i.e. the lease), as there was no interference with respect to the quiet enjoyment of the Plaintiff. The

Defendant was obligated to have the faulty pipe repaired and this was done in a timely fashion. If a breach of the lease is found, the damages sought by the Plaintiff are excessive and improperly calculated. The work that Sharon and Ann Caron performed to deal with the sewage backup was part of the Plaintiff's responsibility under clause 2.1(f) of the lease.

Relevant sections of the Lease

[12] The terms of the lease which are relevant to this action are:

> 2. COVENANTS OF TENANT
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> …
>
> 2.1(d) Repair. Except as provided in Paragraph 3.1, the Tenant shall well and sufficiently repair, maintain, amend and keep the Premises, with appurtenances and all fixtures, in good and substantial repair, reasonable wear and tear excluded;
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> …
>
> 2.1(g) Management of Leased Property. The Tenant shall be solely responsible for the condition, operation, maintenance and management of the Leased Property and the Landlord shall be under no liability for damage to the Tenant's property in the Premises or on the Lands except such loss as may be caused by the Landlord or its agents;
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> …
>
> 3. COVENANTS OF LANDLORD
>
> 3.1(a) Quiet Enjoyment. The Tenant paying the rent hereby reserved and performing the covenants herein on its part contained, shall and may peaceably possess and enjoy the Leased Property for the term of this Lease or any renewal thereof without interruption or disturbance from the Landlord or any other person lawfully claiming by, from or under the Landlord;

> 3.1(b) Structural Repairs. The Landlord shall make any necessary repairs to any structural defects or weakness in the Premises not caused by the Tenant, its agents, employees or invitees and, in so doing, shall, to the extent possible, not unduly disrupt the Tenant's business:
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> 3.1(c) Repairs to Mechanical Etc. The Landlord shall make any necessary repairs to mechanical, electrical and plumbing systems, save and except for routine maintenance by the Tenant pursuant to Subparagraphs 2.1(d) and (f); …
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> 8. GENERAL PROVISIONS
>
> 8.1 Destruction or Damage to Premises. If during the term or any renewal thereof the Premises shall be destroyed or damaged by any cause whatsoever, the following rules shall apply:
>
> (a) if the Premises are unfit in part for occupancy by the Tenant, the rent shall abate in part only in the proportion that the Premises are unfit;
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> (b) if the Premises are wholly unfit for occupancy by the Tenant, the rent shall be suspended until the Premises have been rebuilt, repaired or restored;
>
> …

Analysis

[13] Pursuant to clause 3.1(b) of the lease, the Defendant was obligated to repair this plumbing issue, as it was clearly more than a maintenance issue. Was the covenant of quiet enjoyment breached by the sewer back-up and/or the repairs made to remedy the situation?

Quiet enjoyment

[14] In *Pellatt v. Monarch Investments Ltd*., [1981] O.J. No. 2258 (Co. Ct.), Borins, J. provides a summary of the history of the covenant of quiet enjoyment:

> 26 Was the landlord in breach of its covenant for quiet enjoyment? From the earliest days, the covenant for quiet enjoyment protected against the interference with the tenant's title or possession: *Morgan v. Hunt* (1960), 2 Vent. 213, 86 E.R. 400. In more recent times the Courts have tended to a wider interpretation of covenant (sic). In *Browne v. Flower*, [1911] 1 Ch.219 at 228, Parker J. said:
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> > "It appears to me that to constitute a breach of such covenant there must be some physical interference with the enjoyment of the demised premises, and that a mere interference with the comfort of persons using the demised premises by the creation of a personal annoyance such as might arise from noise, invasion of privacy or otherwise is not enough."
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> 27 In *Owen v. Gadd*, [1956] 2 Q.B. 99 at 107-108, Lord Evershed Master of the Rolls, took this sentence as being correct, and Romer L. J. said:
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> > "It has become quite well established by the authorities that no act of a lessor will constitute an actionable breach of a covenant for quiet enjoyment unless it involves some physical or direct interference with the enjoyment of the demised premises."
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> 28 So too Buckley J. in *Jaeger v. Mansions ConsoL Ltd*. (1902), 87 L.T. 690 at 692, affirmed (1903), 87 L.T. 694: "The disturbance must be of a physical and not a metaphysical nature." In *Phelps v. London*, [1916] 2 Ch. 255, temporary inconvenience due to noise from alterations to the passageway under offices was held insufficient to constitute a breach of the covenant. Finally, in *McCall v. Abelesz*, [1976] Q.B. 585 at 594, Lord Denning M. R. said:
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> > "This covenant is not confined to direct physical interference by the landlord. It extends to any conduct of the landlord or his agents which interferes with the tenant's freedom of action in exercising his rights as a tenant . . . It covers, therefore, any acts calculated to interfere with the place or comfort of the tenant, or his family."

[15] It is clear that in order to establish a breach of the covenant of quiet enjoyment, more than temporary inconvenience must be shown. As set out in *Kenny v. Preen,* [1963] 1 Q.B. 499 (C.A.), the interference must be a 'serious

interference with the tenant's proper freedom of action in exercising its right of possession'. This English decision has been followed in numerous Canadian cases: see *Firth v. B.D. Management Ltd*. (1990), 73 D.L.R (4th) 375 (B.C.C.A.)*; Ulrich (c.o.b. Misty Mountain Gourmet Coffee Co.) v. Quattro Investments Inc.,* 1998 ABPC 38.

[16] In *Firth*, *supra*, the Court outlined the test for a breach of a covenant of quiet enjoyment as follows:

> …Mere temporary inconvenience is not enough - the interference must be of a grave and permanent nature. It must be a serious interference with the tenant's proper freedom of action in exercising its right of possession. See *Kenny v. Preen,* [1963] 1 Q.B. 499 (C.A.).
>
> Similarly, when one considers whether a landlord's acts can be construed as a derogation from its grant, the appellant must demonstrate that there has been some act which renders the premises substantially less fit for the purposes for which they were let.

[17] In *Shun Cheong Holdings B.C. Ltd. v. Gold Ocean City Supermarket Ltd.*, 2002 BCCA 451, the Court stated at para 9: "the plaintiff must show its enjoyment of the demised premises was 'substantially interfered with' by the lessor".

[18] The backup of sewage into the premises was undoubtedly serious, as it resulted in the closing of the Plaintiff's restaurant. Although the duration of the closure was relatively brief, it had serious consequences for the Plaintiff. The closure occurred during the busy summer season leading to a significant loss of business. I am of the view that the backup led to a serious and substantial

interference of the Plaintiff's enjoyment of the premises.

[19] This finding does not, however, end the matter. In order to establish a breach of the covenant of quiet enjoyment, the Plaintiff must, secondly, establish that the breach was the result of an act of commission or omission by the Defendant.

[20] In *Provencal v. J.M. Investments* (1988), 93 A.R. 211 (P.C.), the Court in finding the Plaintiff liable for breach of quiet enjoyment stated:

> …To prove a breach of the landlord's covenant, the Plaintiff must show not only interference with her enjoyment of the premises but also that that interference resulted from some act which may be imputed to him. It has been held as long ago as 1880 that those may be either acts of commission or acts of omission. …

[21] The previous landlords of the premises undertook to have a steam cleaning of the pipes done on an annual or semi-annual basis. This information was provided to the Defendant, prior to its purchase of the premises, in the disclosure letter of October 11, 2012. On June 11, 2013, when Mr. Yim was asked by the Carons to have the pipe steam cleaned, he agreed. The steam cleaning process, however, was of no use, due to the old pipe having failed in one area. Once this was discovered, the only option available was to have the pipe replaced. This was done promptly with the Defendant assuming responsibility for the cost.

[22] The Defendant cannot be found to have committed an act of omission. The Defendant did not deviate from the practice of the previous owners of the

premises of having the pipes steam cleaned. There is no other evidence before me that the Defendant knew or ought to have known that the pipe was subject to failure.

[23] The matter before me may be distinguished from the decision in *Jackson and Jackson v. Spector* [1951] S.J. No. 24 (K.B.) in which the Defendant had not taken appropriate actions to have a pipe repaired, resulting in recurrent flooding to the Plaintiff's leased premises. Pursuant to the lease, the Defendant Jackson had covenanted to repair the drain pipe should it be defective. The Court stated at para. 12:

> Under proper circumstances a breach of the covenant to repair on the part of the lessor will constitute a breach of the covenant for quiet enjoyment should the condition of non-repair or defect exist in part of the demised premises, and the want of repair cause an interference with the physical enjoyment of the premises on the part of the lessees. …

[24] In the case at bar, there were no repeated backups associated with this pipe. There was no warning that the pipe would fail. When it did, the Defendant, with assistance from the Plaintiff, acted in a timely fashion to have the faulty pipe repaired. The Defendant did so in accordance with clause 3.1(c) of the lease. The Plaintiff's claim for breach of contract leading to a loss of business cannot be sustained.

Damages

[25] Although no breach of the covenant of quiet enjoyment has been found, it is necessary to consider what, if anything is owed to the Plaintiff, in all the

circumstances.

[26] Pursuant to clause 8.1(b) of the lease, if the premises are not fit for occupancy by the Tenant, the rent is suspended until the matter is remedied. The entire premises were unfit for occupancy by the Tenant for 1 ½ days (i.e. the afternoon of June 12, 2013 and the entire day of June 13, 2013). As the monthly rent was $3800, a suspension of rent for 1 ½ days equals $190.

[27] The Plaintiff argues that between June 14 and 16, 2013, the restaurant could not be operated at full capacity as the packing of the soil and levelling of the deck had not been completed. The Plaintiff did not have use of 22 seats while awaiting this work to be finalized. Pursuant to clause 8.1(a) of the lease, rent is to be abated in proportion to the amount of space which is unfit for use. Although the evidence is not completely clear on the seating capacity, I find that the loss of 22 seats would amount to approximately one-quarter of the restaurant's capacity. As 25% of the restaurant was unfit for use for three days, rent is abated by that percentage for those three days, for a total of $95.01.

[28] The Plaintiff also seeks damages for the work performed by Ann and Sharon Caron once the plumbing issue became apparent, including mopping up and removing buckets of sewage, as well as cleaning the basement and the equipment that was housed there. The Defendant argues this work falls under regular maintenance and repair of the premises pursuant to clauses 2.1(d) and (g) of the lease. I am unable to accept that submission. The Carons went out of their way to deal with the results of a substantial plumbing issue, for which the

Defendant was responsible pursuant to the lease agreement.

[29] The Plaintiff is entitled to reimbursement for the time of its principals and employees as well as the cost of materials purchased to clean the basement (and the equipment therein).

[30] The Plaintiff seeks a total of $882.50 for work performed by Ann Caron, Sharon Caron and a staff member. Although the number of hours dedicated to cleaning was not clearly established, considering the description of the work which was performed, an appropriate sum for cleaning the premises, in all the circumstances, is $500. The total amount spent on cleaning supplies was $248.79.

[31] The Plaintiff also seeks damages for the time spent by Konn Caron in assisting to remove the deck in order that access to the faulty pipe could be gained. As far as I can ascertain, when Mr. Caron attended the premises to assist, he attended as a volunteer. He never received payment from the Plaintiff. There was no contract between him and the Defendant. As a result, the claim for his time is dismissed.

[32] The Plaintiff seeks damages with respect to other individuals (losses to sub-tenants of the Plaintiff and wage losses of staff). The sub-tenants are not parties to this action and the claim in that respect must be dismissed. The loss of staff wages for the days the restaurant was closed is not recoverable, as the Plaintiff's relief in this regard is limited to my findings pursuant to clause 8.1.

[33] The Plaintiff's claim includes a sum for increased water consumption as a result of the requirement to flush the pipes for an extended period of time to remove debris. The evidence establishes an increase in the amount of water usage from the previous billing period to the period in which the plumbing issue occurred. It is unclear whether the total amount of the increase is as a result of this incident or, in part, because of it being a busier time of year, however, a reasonable estimate of the increased water usage resulting from this incident is $50.

[34] The Plaintiff argues that the Defendant did not restore the area dug up to its original state, which has resulted, at times, in the pooling of rain water in an area where a picnic table is located, thereby dissuading potential customers from sitting there. There is a paucity of evidence in this regard and, as a result, this part of the Plaintiff's claim is dismissed.

[35] Accordingly, the total amount owed to the Plaintiff is $190 plus $95.01 plus $500 plus $248.79 plus $50, for a total of $1083.80. Pre-judgment and post-judgment interest is payable in accordance with the *Judicature Act*.

[36] In all of the circumstances of this case, I decline to award costs.

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CHISHOLM T.C.J.