Citation: *Volare Eurobar Inc. v. Sim,* 2017 YKSM 1

Date: 20170113
Docket: 15-S0108
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before His Honour Judge Chisholm

VOLARE EUROBAR INC. and
SKKY HOTEL INC.

Plaintiffs

v.

GREGOR SIM, MATTHEW VANLANKVELD, TONIMOES
and TONIMOES RESTAURANT INC.

Defendants

Appearances:
Frank Calandra — Appearing as Agent for the Plaintiffs
Gregor Sim — Appearing on his own behalf and on behalf of Matthew Vanlankveld

REASONS FOR JUDGMENT

Introduction

[1] Skky Hotel Inc. and Volare Eurobar Inc. were seeking to lease restaurant premises in 2014. Skky Hotel Inc. is the operator of the hotel in which the premises is situated. Volare Eurobar Inc. is the operator and liquor licence holder of the premises. Gregor Sim and Matthew Vanlankveld are established restaurateurs who were interested in leasing restaurant space in Whitehorse.

[2] Frank Calandra, a director for the Plaintiffs, began negotiations with Mr. Sim in September 2014 with respect to the Skky Hotel restaurant premises. Mr. Sim and Mr. Vanlankveld were not interested in providing the Plaintiffs with a personal indemnity. The Plaintiffs ultimately agreed that a personal indemnity was unnecessary.

[3] The Plaintiff Landlords therefore entered into a five-year commercial lease (the 'lease') with Gregor Sim, in trust for a corporation that was later incorporated as Tonimoes Restaurant Inc. The lease is dated September 19, 2014 and refers to the five-year lease term commencing September 15, 2014. The Plaintiff, Volare Eurobar Inc. ('Volare') says it entered into a management agreement with respect to the restaurant with the Defendant, Matthew Vanlankveld, around the same time.

[4] Further to these agreements, Messrs. Sim and Vanlankveld operated Tonimoes restaurant in the premises of the Skky Hotel beginning in late September 2014. It became apparent relatively quickly that the restaurant was unable to be profitable. Mr. Sim contacted Mr. Calandra to explain that the restaurant was losing significant amounts of money each month, and that the situation was untenable. Mr. Calandra suggested changes to the restaurant's business to improve the situation. Despite some changes, the financial situation of the restaurant did not improve to any great extent. Mr. Calandra appeared understanding of the situation and began searching for another lessee. Messrs. Sim and Vanlankveld continued to abide by the terms of the agreements until another lessee was secured and in place on May 1, 2015.

The Plaintiffs now claim breach of contract with respect to the lease and seek damages in the amount of $25,000 against the corporation Tonimoes Restaurant Inc. ('Tonimoes') which operates another Whitehorse restaurant under the same name, and with which Messrs. Sim and Vanlankveld are associated, and/or against Messrs. Sim and Vanlankveld personally.

[5] In the alternative, the Plaintiff, Volare, claims a breach of the management agreement with Mr. Vanlankveld and seeks damages in the amount of $5,818.89.

Position of the Parties

[6] The parties agree that the Lessee, Tonimoes, repudiated the lease.

[7] The Plaintiffs have raised a number of potential legal issues, including the question of Messrs. Sim's and Vanlankveld's personal liability with respect to the lease and whether there has been a fraudulent conveyance in order to frustrate the Plaintiffs' ability to collect damages.

[8] The Plaintiffs submit that they have suffered significant damages as the result of having to enter into an agreement with another lessee for a lower monthly amount than had been guaranteed in the lease.

[9] Messrs. Sim and Vanlankveld deny any personal liability and deny any fraudulent conveyance. They argue that the Plaintiffs released Tonimoes from the terms of the lease and that no damages are owed.

[10] The Plaintiff, Volare, also submits that damages were incurred by Mr. Vanlankveld's non-compliance with the management agreement.

[11] Mr. Vanlankveld disputes that he knowingly entered into a management agreement with respect to the restaurant which obligated him to pay significant monthly sums to Volare.

[12] The Defendant, Mr. Vanlankveld, argues that even if the Management agreement is valid, it was terminated according to the terms of the agreement.

Analysis

Lease

[13] There is no issue that the commercial lease in question was for a duration of five years or that Tonimoes did not fulfill the terms of the lease. When Mr. Sim advised Mr. Calandra that the restaurant was financially untenable, he made immediate efforts to secure another tenant. Mr. Sim and Mr. Vanlankveld continued to operate their restaurant at a loss until such time as the new tenant was in place.

[14] The issue to be determined is whether the circumstances of the termination of the lease result in damages being owed to the Plaintiffs.

[15] In order to properly address the issue of potential damages with respect to the lease, a determination of the legal status of the lease at the time of Mr. Sim's and Mr. Vanlankveld's departure must be made. The Court in *Elia v. Chater*, (1998), 167 N.S.R. (2d) 166 (C.A.) distinguished between the terms "disclaimer" and "surrender".

> [19]…A disclaimer is a unilateral act terminating the lease while a surrender involves giving up the lease with the consent of the landlord: see L. W. Holden and G. B. Morawetz, *Bankruptcy and Insolvency Law of Canada* (3d, revised) vol 2 at 5 - 143. A surrender may be either express

> or implied. If implied, it is referred to as a surrender by operation of law. This may occur if the tenant accepts from a landlord a new lease incompatible with the existing lease or if the tenant delivers up possession to the landlord and the possession is accepted by the landlord: see *Anger and Honsberger, supra,* at 291 - 292. Whether or not there has been a surrender by operation of law is to be determined by considering and drawing appropriate inferences from the conduct of the parties. As Moorhouse, J. said in *Ferguson v. Craig,* [1954] 4 D.L.R. 815 at 819-20, "Surrender in law has been defined as a surrender effected by the construction put by the court on the acts of the parties, in order to give to those acts the effects substantially intended by them ....": see also Daulat Investments v. Ceci's Home for Children (1991), 1991 CanLII 8325 (ON SC), 85 D.L.R. (4th) 248 (Ont. Ct. Gen. Div.) at 261-262 para. 19 (Emphasis added)

[16] In *Highway Properties Ltd. v. Kelly, Douglas and Co.* [1971] S.C.R. 562, the Court discussed damages occasioned by the termination of a lease by the tenant. The Court found that a landlord may choose to terminate a lease upon the tenant's repudiation or abandonment of the lease, but that the landlord must assert contemporaneously "its right to full damages according to the loss calculable over the unexpired term of the lease".

[17] The case of *Machula v. Tramer* [1971] S.J. No. 291 (Sask. Dist. Ct.) revolved around circumstances in which the Defendant vacated the leased premises prior to the end of the lease. He paid the Plaintiff up to the point where he ceased occupation of the premises. The Plaintiff told him that he was sorry to see him go. Some eight months later, the Plaintiff's solicitors sent the Defendant a demand letter for outstanding rental arrears.

[18] The Court found that the *Highway Properties* case did not apply to this fact situation as the Landlord did not give notice to the Tenant of his intention to seek full damages.

[19] The case law highlights the fact that the conduct of the parties is of utmost importance in determining whether there has been a surrender of a lease. In the matter at bar, the parties dealt cordially and professionally with each other in the weeks before the closing of the restaurant. When Mr. Sim contacted Mr. Calandra in mid-March 2015, Mr. Calandra expressed his understanding of the situation in which Messrs. Sim and Vanlankveld found themselves. He was aware of another individual who had been interested in opening a restaurant the previous fall. Indeed, Mr. Calandra had chosen Messrs. Sim and Vanlankveld over this other individual due to their wealth of experience.

[20] The other individual was still interested when contacted by Mr. Calandra in March 2015. In an e-mail dated March 14, 2015 from Mr. Calandra to Mr. Sim, he wrote:

> Thanks Greg. I appreciate.
>
> I have told him [the potential lessee] about the rent, same as you are paying and told him I would give him same rent free period provided he gives first last (sic) and security deposit, $20k plus GST and I get one year personal guarantee. I do this because like yourselves he is existing (sic) successful operator and I am hoping he will stay for long time (sic).
>
> There are a couple of others I have also put the would (sic) out too, but would not necessarily be as generous with them.
>
> I appreciate your assistance and letting me know.

[21] The individual that Mr. Calandra referenced in this e-mail, who he testified was the only person with whom he discussed taking over the premises, ultimately signed a lease.

[22] As indicated, Messrs. Sim and Vanlankveld agreed to continue to operate Tonimoes until the new lessee was prepared to start. Mr. Calandra confirmed the new

lessee would commence his lease on May 1, 2015. Messrs. Sim and Vanlankveld vacated the premises just prior to the new lease commencing. They left the premises in good order.

[23] Despite the March 14, 2015 e-mail outlining the same monthly rental amount for the new lessee, the Plaintiffs ultimately entered into a lease with the new lessee for a monthly amount of $3,125, which was $1,875 less per month than what the Defendants had been paying. Mr. Calandra testified that all previous lessees had paid $5,000 per month for the premises.

[24] Importantly, Mr. Calandra never advised the Defendants that the new lease was for a lesser monthly amount than what that the Defendants had been paying. Mr. Calandra did not indicate to Messrs. Sim and Vanlankveld that if the Plaintiffs received less money pursuant to the new lease, that he would seek the difference from the Defendants. In my view, this information should have been disclosed, especially in light of the March 14 e-mail. If it had been, the Defendants may have decided to sub-let the premises. The lease permitted a subletting of the premises with the consent of the Landlords, which consent could not be unreasonably or arbitrarily refused.

[25] It was months later that Mr. Calandra wrote to the Messrs. Sim and Vanlankveld, indicating that they should discuss the issue of damages. Mr. Calandra testified that he believed he contacted them in September or October 2015 regarding damages.

[26] This assertion to a right of damages was not contemporaneous with the Defendants repudiation of the lease. In my view, the Plaintiffs accepted the Defendants' surrender of the premises and are disentitled from now seeking damages.

[27] The Plaintiffs argue in the alternative that they suffered damages as a result of the rent free period of a few months that the new lessee received. Again, the Plaintiffs never asserted its rights to damages in a timely fashion. The Plaintiffs should have, in this situation, advised the Defendants of the less favourable terms of the new lease for the Plaintiffs, and expressly indicated its intention to seek damages from the Defendants. In not doing so in the lead-up to the Defendants' departure, the Plaintiffs acted in a manner that would lead a reasonable person to believe that the Defendants had been fully released from the lease agreement.

Management Agreement

[28] The management agreement is the subject of significant dispute. It purports to have been signed on September 15, 2014 and sets out that Gregor Sim and Matthew Vanlankveld were managers of the Volare Eurobar Restaurant – the location of Tonimoes Restaurant - and are on the liquor licence for that premises. In fact, only Mr. Vanlankveld was named on the liquor license. Volare is the company that held the liquor licence.

[29] Mr. Vanlankveld testified that he was in Inuvik on September 15, 2014 and did not move to Whitehorse until September 27, just prior to the opening of the restaurant. In late October, an associate of Mr. Calandra entered the kitchen area of the restaurant to have Mr. Vanlankveld sign a document which enabled him to be on the liquor licence. Mr. Vanlankveld had dealt with liquor licences before and knew that obtaining one involved a small payment of money. He had never seen a management agreement that stipulated any monetary terms. Mr. Sim testified in a similar fashion on this point.

[30] It appears to be common ground that Mr. Vanlankveld signed the agreement in late October and it was subsequently back dated to September 15, 2014 to coincide with the commencement of the five-year lease.

[31] Mr. Vanlankveld was aware that the liquor inspector had raised concerns about his name not being on the licence. He recalls being in his chef's clothing in the restaurant when he was presented with and quickly signed the document. He recalls only seeing the second page of the document which consists of the signing blocks, although he admits that he did not review the document before signing it, as he understood it was a standard, straightforward management agreement to satisfy the liquor inspector. I should point out that unlike the lease agreement where each page of the document was initialed by both Messrs. Sim and Vanlankveld, the first page of the management agreement containing its terms was not initialed by Mr. Vanlankveld.

[32] Mr. Vanlankveld testified he had no idea that the document in fact stated that he would be responsible for a monthly payment of $5,000 for the privilege of being on the liquor licence. If he had understood this, he would not have signed it.

[33] He argues that the liquor licence is only worth the money paid to the Yukon Liquor Corporation in order to have the licence.

[34] Mr. Calandra, on behalf of Volare, testified that the management agreement was put in place to ensure that Messrs. Vanlankveld and Sim were personally liable during the first year for $5,000 monthly payments to the Plaintiffs. Mr. Calandra acknowledges that Messrs. Vanlankveld and Sim rejected the initial lease proposal

which included personal indemnities from both, but suggests there was no express rejection of the monthly payments set out in the management agreement.

[35] Mr. Calandra testified that the management agreement gave the Plaintiffs a personal guarantee for the first year. However, the agreement clearly states that it is for a five-year period with a value of $60,000 a year.

[36] Mr. Calandra also states that the liquor licence had value to these two gentlemen, as they did not have to go through the process and cost of obtaining the licence. However, I do note that the lease at clause 4(m) makes Tonimoes responsible for the cost of the annual liquor licence for the premises. I also observe that Mr. Calandra's testimony reveals he viewed the $5,000 monthly rental amount to be one and the same as the $5,000 monthly management payment. He clearly stated that he was seeking, pursuant to the management agreement, the shortfall for monies owed to the Plaintiffs in the first year of the lease, namely $5,818.89. He arrived at this figure by taking the first year rental amount and subtracting the rental payments received from the Lessee before repudiation of the lease, as well as the rental payments from the subsequent tenant who commenced operations in May 2015.

[37] I do not accept that there was a meeting of the minds between Volare and Mr. Vanlankveld with respect to the management agreement. Based on his unwillingness to proffer a personal guarantee on the lease, I do not accept that within a month and a half he had a change of heart. I accept his evidence that he understood the management agreement to be a necessity in order for his name to appear on the liquor licence.

[38] I find that Mr. Calandra did not have discussions with either Mr. Vanlankveld or Mr. Sim with respect to any form of personal liability by way of the management agreement. Mr. Vanlankveld should not have assumed anything and should have read the agreement before signing it. However, he did so based on a mistaken assumption. I accept that he would not have signed the document with full knowledge of its contents.

[39] Interestingly, there is no evidence that either Mr. Calandra or his associates ever asked Mr. Sim, who had been the main negotiator in this deal, to ever review or sign the management agreement. I find this odd considering his lead role in negotiating the lease and the fact that his name appears as a party on the management agreement.

[40] I find that Mr. Calandra, in securing Mr. Vanlankveld's signature, obtained through the back door what he had been unable to do through the front door. As indicated, this was a vehicle to overcome the lack of personal guarantees on the lease. Following the signing of the management agreement, no monies were requested or received from Mr. Vanlankveld. This supports the view that Mr. Calandra intended the agreement to be a substitute for the lack of personal indemnities on the lease.

[41] I find that the management agreement is invalid, as Mr. Vanlankveld did not, despite his signature, display any intention to assent to the terms of this contract. Mr. Calandra was well aware of Mr. Vanlankveld's reluctance to be personally liable in this business arrangement. Having direct knowledge of this fact, Mr. Calandra should have pointed out to Mr. Vanlankveld the term of the management agreement which made him liable for the $300,000 for which he had earlier declined to provide a personal guarantee.

[42] I also find that the agreement offered very little value to Mr. Vanlankveld, considering that Tonimoes was already obligated to pay for the liquor licence fee and secondly that the process of obtaining a liquor licence for a restaurant is not an onerous process. Based on all the circumstances, it is clear that the document was simply an attempt to secure a personal guarantee for the monthly rent payments, something that had been earlier rejected by Messrs. Sim and Vanlankveld.

[43] In the event I am in error on this point, I look to the terms of the management agreement in order to determine if a proper termination occurred. The second clause of the agreement allows for either party to terminate the agreement by submitting 60 days written notice.

[44] In an e-mail dated March 13, 2015, Mr. Sim advised Mr. Calandra that the Defendants would continue to operate the restaurant until May 1, 2015 or until another tenant was secured. At this point, Mr. Calandra clearly understood that the restaurant would cease operations. Mr. Calandra replied on April 25 that he had leased the space to a new tenant beginning May 1. In my view, the circumstances reveal that Volare received 60 days' notice. The Plaintiffs opted to lease the premises before the 60 days came to pass, even though Messrs. Sim and Vanlankveld were willing to remain there beyond the 60 day notice period.

[45] As a result, I find that the management agreement was terminated. Mr. Vanlankveld is not liable to the Plaintiff, Volare, for any damages.

[46] As the Plaintiffs have been unsuccessful in this matter, I award costs to Messrs. Sim and Vanlankveld in the amount of $400 for preparation and filing of pleadings.

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CHISHOLM T.C.J.