SUPREME COURT OF YUKON

Citation: *Yukonstruct v. Connolly*, 2019 YKSC 67

Date: 20191213
S.C. No. 19-A0133
Registry: Whitehorse

BETWEEN

YUKONSTRUCT SOCIETY

PETITIONER

AND

BRIONI CONNOLLY

RESPONDENT

Before Chief Justice R.S. Veale

Appearances:
James Tucker — Counsel for the petitioner
Vincent Larochelle — Counsel for the respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] Yukonstruct Society ("Yukonstruct") is a landlord of a business premise and brings this petition for a writ of possession and other remedies against Brioni Connolly, their tenant, in a lease dated November 8, 2018 ("the Lease").

[2] Ms. Connolly defends on the ground that Yukonstruct is estopped from denying that she had her tenancy renewed to October 31, 2020, or that Yukonstruct intended to renew it.

[3] The primary issue is whether Yukonstruct is estopped by its words or conduct from denying the renewal of the Lease or an intention to renew the Lease. A second

issue, if Ms. Connolly is not entitled to relief from the termination date of October 2019, is whether she is subject to the wilfully overholding penalty in s. 42 of the *Commercial Landlord and Tenant Act*, R.S.Y. 2002, c. 131.

THE LAW OF EQUITABLE ESTOPPEL

[4] There are many types of estoppel in legal jurisprudence: promissory estoppel, estoppel by representation of fact, proprietary estoppel, estoppel by convention, estoppel by deed, and estoppel by negligence. In this case, I will address what is often referred to as promissory estoppel or equitable estoppel which may arise by words or conduct. While the principle of equitable estoppel may be deceptively straightforward to present, the application of the principle is very fact specific.

[5] The Supreme Court of Canada has a number of cases on estoppel.

[6] In *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607 ("*Burrows v. Subsurface*"), Ritchie J. stated at p. 615:

> [16] In the case of *Combe v. Combe*, Lord Denning recognized the fact that some people had treated his decision in the *High Trees* case as having extended the principle stated by Lord Cairns and he was careful to restate the matter in the following terms:
>
> > The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

> [17] It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.
>
> [18] It is not enough to show that one party has taken advantage of indulgences granted to him by the other for if this were so in relation to commercial transactions, such as promissory notes, it would mean that the holders of such notes would be required to insist on the very letter being enforced in all cases for fear that any indulgences granted and acted upon could be translated into a waiver of their rights to enforce the contract according to its terms. (my emphasis)

[7] The facts of that case are that Subsurface gave a promissory note to Burrows which required monthly payments that provided that on default of payment for 10 days, the whole amount would become due. For 16 months, Burrows accepted payments more than 10 days late without objection but, when payment was 36 days late, Burrows claimed the full amount.

[8] The Supreme Court of Canada awarded judgment on the full amount because the evidence did not support the inference that Burrows entered into any negotiations which had the effect of leading Subsurface to suppose that Burrows had agreed to disregard that part of the contract.

[9] In *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 ("*Maracle*"), Maracle owned a building destroyed by fire. Travellers Indemnity admitted liability for the claim in the amount of $84,000 and agreed to pay the money into court. Maracle did not respond but commenced an action after the expiry of the limitation period. The issue

was whether the admission of liability and payment into court amounted to a promise that Travellers Indemnity Co. would not rely on the limitation period defence.

[10] The Supreme Court of Canada concluded that the facts did not support promissory estoppel as the trial judge found there was no promise relating to the limitation period as well as the fact that the offer was made "without prejudice" meaning that the party making the offer was free to assert all its rights.

[11] The Supreme Court of Canada also quoted the same principle stated in *Burrows v. Subsurface*, at para. 17, quoted above.

[12] The Court added at para. 16 of *Maracle*:

> [16] … There must be something more for an admission of liability to extend to a limitation period. The principles of promissory estoppel require that the promissor, by words or conduct, [page59] intend to affect legal relations. Accordingly, an admission of liability which is to be taken as a promise not to rely on the limitation period must be such that the trier of fact can infer from it that it was so intended. There must be words or conduct from which it can be inferred that the admission was to apply whether the case was settled or not, and that the only issue between the parties, should litigation ensue, is the issue of quantum. Whether this inference can be drawn is an issue of fact. If this finding is in favour of the plaintiff and the effect of the admission in the circumstances led the plaintiff to miss the limitation period, the elements of promissory estoppel have been established. (my emphasis)

[13] In *6781427 Holdings Ltd. v. Alma Mater Society of the University of British Columbia*, [1987] B.C.J. 1908 (B.C.C.A.) ("*Alma Mater Society*"), the British Columbia Court of Appeal applied the remedy of equitable estoppel in a landlord and tenant context.

[14] The lease gave the tenant the right to renew the lease for a further two years provided the tenant gave written notice before the final six months of the lease. The

landlord and tenant began to negotiate the request of the tenant to have a larger space to rent and a longer lease. The tenant did not give written notice as it seemed redundant with the expansion negotiations. Then the landlord gave notice that the lease would terminate as the tenant did not provide their written intention to renew the lease.

[15] The British Columbia Court of Appeal agreed with the trial judge that there was a clear element of negotiation where the tenant would continue to be a tenant and the only issue was the uncertainty over the size of the area to be occupied. The Court found that it would be inequitable to permit the landlord to rely on the failure to give written notice.

[16] I conclude that the principle of equitable estoppel may be summarized as follows:

1. There must be a course of negotiation where the words or conduct of one party were intended to affect the strict rights under the contract. It is not enough to show that one party has taken advantage of indulgences granted as part of commercial relations.
2. Once the other party has acted upon the words or conduct amounting to a promise or assurance, the party that made the promise or assurance cannot revert to the previous legal relationship.

The Lease

[17] By a written lease dated November 8, 2018, Yukonstruct leased a restaurant space in its premises that was divided up into small, individual workspaces made available to start-up entrepreneurs.

[18] The term of the Lease was from November 1, 2018, to October 31, 2019. Paragraph 3(w) contained a first right of refusal to renew the Lease for an additional year if the tenant gave written notice of their intent to renew in writing 90 days before

the expiration of the term of the Lease, i.e. July 31, 2019, at the latest. Paragraph 3(w) states:

> 3(w) First Right of Refusal. The Tenant shall have the first right of refusal to renew the lease for an additional year if the Tenant gives their intent to renew in writing to the Landlord a minimum of 90 days prior to the expiration of the term of the lease.

[19] The Lease contained an overholding clause permitting the tenant to continue to occupy the premises with the consent of Yukonstruct. Paragraph 8.4 is as follows:

> 8.4 Overholding. If the Tenant continues to occupy the Premises with the consent of the Landlord after the expiration of this lease or any renewal thereof without any further written agreement the Tenant shall be a monthly Tenant at a monthly rental equivalent to 1/12 of the annual rental and all other sums payable hereunder pro rated for one month.

[20] Paragraph 8.12 of the Lease stated:

> 8.12 Changes to Agreement. No provision of this lease shall be deemed to have been changed unless made in writing signed by the Landlord and Tenant, and if any provision is unenforceable or invalid for any reason whatever, such unenforceability or invalidity shall not affect the remaining provisions of this lease and such provisions shall be severable from the remainder of this lease.

THE POSITION OF CONNOLLY

[21] Counsel for Ms. Connolly submits that the interactions between Ms. Connolly and Yukonstruct staff during the term of the lease made it clear that the lease had been renewed or would be renewed based on the following interactions:

a) Verbal conversations in June and July that the Lease would be renewed for another year.

b) The idea of Yukonstruct's staff on July 29, 2019, that monthly meetings be held with Ms. Connolly.

c) The fact that a meeting did occur on September 23, 2019, where renewal of the Lease was discussed.

d) The assistance given to Ms. Connolly by Ms. Selbee and Ms. Hampson to find staff for the restaurant in early September 2019.

e) The referral of at least two events which would take place after October 31, 2019.

f) The fact that the September 23, 2019 meeting discussed solutions for the noise issue with Ms. Connolly's child and long-term noise dampening issues.

g) The assistance to Ms. Connolly in having her sign added to the sign tower outside the premise on September 23, 2019.

[22] Counsel for Ms. Connolly, in written submissions, submitted that the following evidence supported Ms. Connolly's belief that the Lease had been renewed:

a) On July 27, 2019, Ms. Connolly paid for her business to be included in the Whitehorse City Map Guide for 2020;

b) On October 5, 2019, she ordered additional promotional materials and signage for her business;

c) On October 9, 2019, she hired full-time staff;

d) On September 23, 2019, Yukonstruct began to research noise-dampening solutions;

e) That Yukonstruct agreed on September 30, 2019, to allow a painting to be hung in the restaurant in December 2019;

f) That Ms. Connolly made no attempts to find an alternative location for her business.

FACTS

[23] Based upon the affidavits filed in this case and the multitude of emails and correspondence exhibited, I find the following facts:

1. The major dispute between Yukonstruct and Ms. Connolly was the noise caused by her child crying and screaming which caused complaints from other tenants in the Yukonstruct premises. The noise issues were never resolved despite many discussions and emails.
2. It is agreed that Ms. Connolly did not give her intent in writing to renew the Lease for an additional year.
3. There is a clear conflict in the evidence. Ms. Connolly and Mr. O Murchú, her partner, allege that Yukonstruct staff verbally agreed to renew the Lease or negotiate a renewal. Yukonstruct staff deny that there was such a verbal understanding. I find that there were no verbal conversations, agreement or understanding that the Lease would be renewed or renewal negotiated. I am supported in this finding by the fact that in the multitude of emails between Yukonstruct staff and Ms. Connolly and her partner from the commencement of the tenancy in December 2018 to July 31, 2019, there is no written confirmation of the allegation that there was a renewal of the Lease or an agreement to renew. On the contrary, I find that staff at Yukonstruct did their best to deal with and diffuse a difficult situation that began with noise complaints but escalated to allegations of discrimination against women entrepreneurs by Ms. Connolly and Mr. O Murchú.

4. In the period between August 1 and October 11, 2019 (the date of the Yukonstruct's termination letter to Ms. Connolly) there was no written confirmation of the renewal of the Lease or an agreement or intent to renew the Lease. There was, on September 23, 2019, a brief discussion of the possibility of a renewal of the Lease but no promise or assurance of a renewal of the Lease or negotiations of any kind.
5. I do find that Ms. Connolly took a number of steps to advance her business such as hiring staff, listing her business on the Whitehorse City Map Guide, ordering additional promotional and signage for her business, including asking to be added to the sign tower.
6. Yukonstruct did refer business to Ms. Connolly that would take place in November 2019 and did assist Ms. Connolly in finding staff for her business, up until October 11, 2019.
7. Ms. Selbee and Ms. Hampson were quite willing to meet Ms. Connolly to discuss the noise issue and other solutions with Ms. Connolly.
8. The final period of the Lease from October 11 to October 31, 2019, when the notice to terminate was given, it was followed by a written assurance that Yukonstruct would permit Ms. Connolly to overhold as a tenant for a reasonable period.

DISPOSITION

[24] The principle of equitable or promissory estoppel requires a course of negotiation where by words or conduct, Yukonstruct intended, or it could be inferred that it intended, to change the legal position of Yukonstruct and Ms. Connolly. I have found no words or conduct that resulted in such an intention being expressed or from which an inference

should be drawn that there was a renewal of the Lease or an agreement to enter negotiations to renew the Lease. To the contrary, the efforts of Yukonstruct staff indicate a desire to maintain a good relationship with Ms. Connolly and Mr. O Murchú in a challenging situation.

[25] The actions of Ms. Connolly, at best, indicated her expectation that the Lease would be renewed but I have found no basis in the words or conduct of Yukonstruct or its staff to raise or infer such a promise or assurance. In my view, promissory estoppel requires an assessment of whether Yukonstruct or its staff, by words or conduct, made a promise or assurance, express or inferred, that Yukonstruct renewed or intended to renew the Lease. I am also of the view that "friendly indulgences" and conversations took place in this landlord and tenant relationship that did not amount to promissory estoppel.

[26] The referral of catering business for November 2019, did not depend on the Lease and was not an assurance of the renewal of her lease.

[27] I do not place any significance on the fact that the parties referred to paragraph 3(w) of the Lease as a right to renew rather than the precise wording of a right of first refusal.

[28] I am not of the view that Paragraph 8.12 requiring changes to the Lease to be made in writing in any way ousts the jurisdiction of this Court to grant equitable relief in appropriate circumstances.

[29] In this case, Yukonstruct gave a clear written promise that Ms. Connolly could, if she wished, propose additional time to vacate the premises. The parties were unable to reach agreement on that offer. However, Yukonstruct has clearly given an assurance that Ms. Connolly would not be held to the strict terms and penalty of double rent of

overholding tenants set out in s. 42 of the *Commercial Landlord and Tenant Act*. In my view, Yukonstruct is not entitled to a declaration under s. 42.

CONCLUSION

[30] I dismiss Ms. Connolly's claim for equitable relief that her tenancy has been renewed or assured that it would be renewed.

[31] I conclude that Yukonstruct contemplated a reasonable overholding to permit Ms. Connolly to leave the premises in the words of her counsel "peacefully and as quickly as possible". It is appropriate to declare that Ms. Connolly is not wilfully overholding her tenancy so as to warrant her immediate removal from the premises or be liable for the increased rent associated with overholding under s. 42 of the *Commercial Landlord and Tenant Act.*

[32] In the circumstances, I grant Ms. Connolly the right to overhold as a tenant at the regular rental rate until January 31, 2020, when she is required to be out of the premises. I grant Yukonstruct a writ of possession to be exercised on February 1, 2020.

[33] I am adjourning the December 16, 2019 court date.

[34] Counsel may speak to the Trial Coordinator for a date in 2020 to make submissions on costs, if necessary.

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VEALE C.J.