

Citation: *Rayo v. Lachance*, 2015 YKSM 3

Date: 20150804
Docket: 14-S0060
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before Her Honour Judge Orr

MARIO O. RAYO

Plaintiff

v.

GARY LACHANCE

Defendant

Appearances:

Mario Rayo

Gary Lachance

Appearing on his own behalf

Appearing on his own behalf

REASONS FOR JUDGMENT

[1] ORR T.C.J. (Oral): I have had the opportunity to review the materials that have been filed in this matter by the plaintiff, Mr. Rayo, and the defendant, Mr. Lachance, as well as to hear the witnesses who have testified in this matter. From those materials and the sworn evidence, I find the following to be the facts:

[2] Gary Lachance and Mario Rayo signed a lease with Volare Eurobar Inc. to rent and run a restaurant in the SKKY Hotel, Whitehorse, Yukon. The lease was for a period of one year, from September 1, 2013 to August 31, 2014. They signed the lease as operators in a personal capacity in July 2013. A copy of that lease has been filed with the Court. It is Exhibit 2 to the plaintiff's claim in this matter.

[3] Mr. Rayo and Mr. Lachance then formed a company to run that business. While there is a dispute as to the name of that company, the evidence of Mr. Rayo, Mr. Lachance, and the independent witness, Mr. Calandra -- the director of the Volare Eurobar Inc. and the manager of the SKKY Hotel at the time -- is clear: the company was formed to run the restaurant business that Mr. Rayo and Mr. Lachance had leased at the SKKY Hotel.

[4] When I say there is an issue with respect to the name, there is a unanimous shareholder agreement at Exhibit 1 of the plaintiff's materials, indicating it is between Mario Rayo, Gary Lachance, and Dos Amigos Cantina Company.

[5] Mr. Rayo testified that Yukon Corporations would not accept that name; that there were a number of name changes; and that there was a numbered company. Exhibit 4 of Mr. Rayo's materials indicates a Yukon Corporation Report, dated 2013-10-16. The company name was 535520 Yukon Inc. and indicates, among other things, the directors were Lachance, Gary; Rayo, Mario. Addresses of both were "c/o MURRIN LAW OFFICE", here in Whitehorse, Yukon. The name change history on the document at that date was that none had changed.

[6] There is correspondence in the materials that have been filed by both parties indicating that a company by the name of 535573 Yukon Inc. had dealings with the SKKY Hotel. In fact, at Exhibit 7 of the plaintiff's materials, it was that company to which the SKKY Hotel sent, to the direction of both Mr. Rayo and Mr. Lachance, on September 9, 2014, the final accounting with respect to the security deposit and the bills

coming from that. It seems that those company names and numbers all were involved with respect to the restaurant.

[7] Problems ensued, such that Mr. Lachance withdrew from active involvement with the restaurant around the end of December 2013. This was confirmed by Mr. Calandra. Mr. Rayo fulfilled the balance of the lease without Mr. Lachance. Efforts were made through legal counsel to terminate the corporate relationship of Mr. Rayo and Mr. Lachance, without success.

[8] In April 2014, Mr. Lachance acknowledged he attended the TD Bank, found his access to the corporate account had been deactivated, and had it reactivated. On August 11, 2014, Mr. Lachance withdrew \$3,000 from that account.

[9] During his testimony here today, Mr. Lachance explained that he had worked at the business for a number of months in the fall of 2013 without remuneration. When cross-examined by Mr. Rayo on this point, he acknowledged that neither he nor Mr. Rayo had been paid for their labours, and that it was, in his words, their "sweat capital". However, he justified this withdrawal of the \$3,000 on the basis that he had not been reimbursed for items that he had purchased in the fall of 2013. Despite the many papers that he presented to the Court, he did not offer any receipts to justify \$3,000 of reimbursement in this manner.

[10] I should note that although Mr. Rayo in his documents indicates claim for a loss and that the defendant's share of that loss would be 50 percent, the loss that he was claiming was \$65,112.84. At the opening of this proceeding, Mr. Rayo indicated that he was willing to amend his claim, and that the share of the loss that he was claiming from

Mr. Lachance was \$25,000, which is the maximum amount that the Small Claims Court has jurisdiction to award. His claim was therefore amended on that basis.

[11] A key aspect of this matter is the lease that was executed by Mr. Lachance and Mr. Rayo as operators, in their personal capacity, with Volare Eurobar Inc. in July of 2013. In particular, paragraph 3 of that lease indicates that the operators had agreed to pay to the sub lessor, the Volare Eurobar Inc., the annual amount of rent of \$60,000, plus GST, to be paid in accordance with the payment schedule that was attached to that lease. A security deposit was required of \$10,000, which, as seen from the materials, was provided and was used for unpaid accounts at the end of that lease.

[12] Paragraph 4 is key. The operators being referred to therein are Gary Lachance and Mario Rayo. It provides:

THE OPERATORS COVENANT AND AGREE with the
Sub Lessor as follows:

- a) to pay net rent as set out above and defined in the Payment Schedule "A" attached.
- b) the OPERATORS will be responsible for Volare propane usage as determined by a separate propane meter for the Volare Restaurant. The previous months usage cost will be paid by the 1st of each month. The Sub Lessor to provide the OPERATORS on the 1st of each month with an invoice for these charges.
- c) the OPERATORS will be responsible for all of the monthly garbage collection fees pertaining to Volare estimated at \$137.50 per month. This amount will be paid by the 1st of each month.
- d) the OPERATORS will be responsible for paying the cable tv and satellite service.
- e) the OPERATORS will be responsible for any fees associated with installing their own telephone lines, merchant services machine and debit machine. Each of these accounts is to be put in the OPERATORS' name and not in the Sub Lessor's name.

...

- i) the OPERATORS are responsible for having the kitchen hood cleaned by a professional company that specializes in same. The OPERATORS are to have it also inspected by the appropriate authorities and provide the Landlord with proof of the cleaning and inspection of the kitchen hood.

...

- m) the OPERATORS are responsible to pay to the Sub Lessor the annual fee for the renewal of the liquor license for Volare Eurobar Inc., which was approximately \$850.00 in 2013. ...

[13] There are many other obligations in there, but those are certainly the ones that are most relevant for this particular matter.

[14] In the evidence that is before me it is noted that Mr. Lachance was not actively involved in the running or operation of the restaurant after the end of December 2013. The lease continued until August 31, 2014. Mr. Lachance's obligations under the lease continued.

[15] Since there has been no documentation provided to me and, in fact, the evidence would indicate that no other agreements, contrary to the ones that are before me, were entered into, despite efforts to have the relationship terminated subsequent to the time when Mr. Lachance was not actively involved in the restaurant. That did not occur. His obligations continued.

[16] There is no indication in the materials that have been filed or the evidence that I have heard during the trial here today that Mr. Lachance made any payments of any sort whatsoever towards the obligations under the lease for the restaurant, either

personally, through the corporation, nor in any manner did he direct any funds towards that particular obligation.

[17] In this matter, the rent is set out on Schedule "A", the payment schedule to the lease, found at Exhibit 2 of the plaintiff's materials. Monthly payments for rent, including GST, from January of 2014 to August of 2014 are as follows:

January:	\$7,000
February:	\$4,200
March:	\$4,200
April:	\$4,200
May:	\$5,250
June:	\$6,300
July:	\$6,300
August:	\$6,300

[18] The sum of those amounts is \$43,750, of which Mr. Lachance's obligation would have been one half, or \$21,875.

[19] The garbage was indicated to be approximately \$137.50 per month. From the materials that I have looked at in evidence, I do not see any indication otherwise, in the documents that have been filed. Garbage collection fees are set out as well on Schedule "A", the payments, of Exhibit 2 to the plaintiff's materials that are filed in this case. At \$137.50 per month for garbage collection, the cost for eight months amounts to \$1,100. One half of that amount is \$550.

[20] As noted, the operators, Mr. Lachance and Mr. Rayo, were to pay the propane. The specific amounts of the propane are set out in the months of June, July, and August in the accounting from the SKKY Hotel with respect to the amounts that were being deducted from the security deposit. The financial statement that was filed with the Court today as Exhibit 9 sets out a total payment in respect of the propane expense being \$5,587.01 for the period September 2013 to August 2014. As noted in the accounting that was provided for June, July, and August, two of those payments were the same and one fluctuated. Taking the \$5,587 and dividing that by 12, I get an average of \$465 per month. Multiply that by eight months, I get \$3,720. And when I divide that by two, as to the obligation of each of the operators, I get \$1,860, in respect of the propane obligation for the last eight months of the lease.

[21] Insurance was also an obligation of the parties. The materials filed indicate that there was an insurance payment of \$1,926. Fifty percent of that is \$963.

[22] There is also the amount of the \$3,000 that was withdrawn from the corporate account by Mr. Lachance in August 2014. That same corporate account was used in respect of the payment of the accounts and in respect of the security deposit of \$10,000.

[23] An amount of \$787.50, including GST, was also paid for the semi-annual inspection of the kitchen fire suppression system. That, again, was an obligation in respect of the lease that Mr. Lachance and Mr. Rayo signed. Fifty percent of that is \$393.75.

[24] I do not need to go any further because I have already exceeded the jurisdiction of the Small Claims Court.

[25] In respect of this matter, I have determined that Mr. Lachance's obligation under the lease that he and Mr. Rayo signed in July of 2013, in respect of the restaurant that they started to operate at that time for a period of one year at the SKKY Hotel in Whitehorse, is a minimum of \$25,000 and I order that he make that payment to Mr. Rayo.

[26] Again, just to summarize, that is based on:

- one half of the rent, his share being: \$21,875
- one half of the garbage: \$ 550
- one half of the propane: \$ 1,860
- one half of the insurance: \$ 963
- one half of the fire inspection: \$ 393.75

[27] The sum of those amounts is in excess of \$25,000, so I round that off to be simply \$25,000. That does not include the \$3,000 taken from the corporation account by Mr. Lachance in August, 2014. That is still over and above that amount but that is not something that can be recovered, given the amount of the claim.

[28] There will be a judgment in favour of the plaintiff, Mr. Rayo, in the amount of \$25,000.

[29] Just to make it clear, the claim that I am allowing in respect of this matter is for the expenses that were incurred in respect of the lease from the period of January 1,

2014 until the end of the lease on August 31, 2014. During this time, Mr. Lachance was not actively involved with the restaurant but the obligations under the lease did continue. They were assumed by Mr. Rayo so that there would not be, as Mr. Calandra indicated, a lawsuit in order to recoup the monies that would have been owed under that lease agreement if Mr. Rayo had not picked up all of the obligations under that matter. This is to reimburse him for what was paid in respect of that matter.

[30] The amount of the claim that I am awarding to Mr. Rayo is \$25,000, together with interest as set out under the *Judicature Act*, RSY 2002, c. 128 or the *Small Claims Court Act*, RSY 2002, c. 204 whichever is applicable in respect of this matter, until such time of payment.

ORR T.C.J.