



Civil Resolution Tribunal

Date Issued: March 22, 2018

File: SC-2017-003535

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Michael's Beer Factory Inc. v. Cupcasions Handheld Dessert Specialists Inc. et al*, 2018 BCCRT 90

B E T W E E N :

Michael's Beer Factory Inc.

APPLICANT

A N D :

Cupcasions Handheld Dessert Specialists Inc., Elizabeth Lineker, and Paul Philips

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about whether the respondents owe \$1,900 in outstanding rent for December 2016 under a commercial lease. The parties are self-represented.

JURISDICTION AND PROCEDURE

2. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 3.1 of the *Civil Resolution Tribunal Act* (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
3. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions, because I find that there are no significant issues of credibility or other reasons that might require an oral hearing. No one requested an oral hearing.
4. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
5. Under tribunal rule 121, in resolving this dispute the tribunal may: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

ISSUES

6. The issue in this dispute is whether the respondents owe the applicant commercial rent for the month of December 2016, bearing in mind the parties' agreement that the lease could be terminated early.

EVIDENCE AND ANALYSIS

7. In a civil claim such as this, the applicant bears the burden of proof, on a balance of probabilities. I have only addressed the evidence and arguments to the extent

necessary to explain my decision. I dismiss the applicant's dispute, for the reasons set out below.

8. The applicant Michael's Beer Factory (Michael's) is the landlord in a commercial lease of a property located on Spall Road in Kelowna (Property). Since July 2008, Michael's had sub-leased the Property to the respondent Cupcasions Handheld Dessert Specialists Inc. (Cupcasions).
9. The parties dispute the responsibility of the individual respondents Paul Philips and Elizabeth Lineker, who worked with Cupcasions. Given my conclusion that the dispute should be dismissed, nothing turns on their status.
10. The parties' lease agreement had December 31, 2017 as the end date. Cupcasions moved out of the Property on December 31, 2016, after Michael's agreed in around September 2016 to let Cupcasions end their lease early, at the end of December 2016. Michael's claims \$1,900 in rent for the month of December 2016.
11. During those fall 2016 discussions about ending the tenancy early, I find there was no mention of any penalty for early release, which is not disputed by Michael's.
12. It was not until mid-December 2016 that Michael's requested payment of the December 2016 rent. Cupcasions refused to pay, saying they felt it should be covered by the last month's payment paid at the time the lease was signed. Michael's responded that because Cupcasions broke the lease early the "last month's rent" provided in October 2015 was to be used to cover the transition period of January 2017, before new tenants moved in and started paying rent in February 2017. As discussed below, I find the parties' agreement did not permit that approach.
13. I turn then to the parties' written lease agreement for the Property, which I find was made up of two documents, which are relied upon by Michael's. The first was signed July 1, 2008 (Lease 1), and expired in December 2012. The second was signed September 30, 2015 (Lease 2). I note there is no evidence before me as to

what agreement governed the parties between December 2012 and September 30, 2015. Nothing turns on this gap, given my ultimate conclusion below.

14. I also note that the respondent Cupcasions is the same corporate entity as the Cupcasions that was party to Lease 1. In other words, contrary to Cupcasions' submission, it is irrelevant that Cupcasions was owned by a different person in 2008.
15. Lease 2 is a one-page document between Michael's as the "landlord" and Cupcasions as the "tenant". Lease 2 states the landlord and tenant desire to "renew the term of the lease", and that otherwise "the said lease remains in full force and effect as originally executed". I therefore find Lease 2 includes the material terms of Lease 1, as updated by those terms contained in Lease 2.
16. The Lease 2 terms are brief, and simply state that the monthly rental rate is \$1,820 until the end of 2015, with the rent increasing to \$1,900 for each month in 2016, and to \$1,980 for each month in 2017. Lease 2 says the lease ends December 31, 2017. As with Lease 1 discussed below, there is nothing in Lease 2 requiring written notice to end tenancy. Similarly, there is no penalty clause or other terms in the event of an early end.
17. Contrary to Michael's submission, the Lease 1 terms about express waiver in writing and notice in writing do not assist it. I say this because the 'notice' clause 6.11 does not require notices to be in writing. Rather, it says that where notices are required in writing, they must be delivered by personal service or mailed to the specified address. In any event, I find that Michael's cannot now rely upon any failure to give notice in writing, when it did not require that when it admittedly agreed to let Cupcasions end the tenancy early. Further, the express waiver clause is irrelevant because, as noted, there are no terms in the lease that state an early notice of end of tenancy must be given in writing or that Michael's will keep "the last month's rent" if the tenancy ends early.

18. The material term in Lease 1 simply says “First and last month’s rent to be paid upon signing of the lease”. While Lease 1 says the lease will be “fully completed” on December 31, 2012, the “last month’s rent” is not defined.
19. Thus, this dispute turns on how “last month’s rent” should be interpreted. Michael’s says the lease agreement, contained in Lease 1 and 2, contractually provided that December 2017 was the last month’s rent. Michael’s says the “last month’s rent” Cupcasions provided in October 2015 therefore goes to December 2017 rent, and so Cupcasions still owes rent for December 2016. Michael’s submits that there was never any agreement that the “last month’s rent” covering December 2017 would be moved up to cover the rent owing in December 2016 in the event of the early release. I disagree.
20. Michael’s did not raise the potential loss of a month’s rent until the mid-December 2016 meeting. Until at least mid-December 2016, Michael’s never took the position that the “last month’s rent” paid over a year earlier would not apply to the December 2016 rent, which was, in fact, Cupcasions’s last month. Put another way, until mid-December 2016, Michael’s had never told Cupcasions that it interpreted “last month’s rent” as being December 2017 based on Lease 2, even though Michael’s had earlier agreed to release Cupcasions from its lease early with the actual last month agreed upon as December 2016.
21. I note the provisions of the *Commercial Tenancy Act* do not assist in resolving this dispute. I find Michael’s interpretation of “last month’s rent” to be unreasonable and inconsistent with a plain reading of Lease 1 and 2. I say this because “last month’s rent” does not specify a date. In agreeing to the early release, I find Michael’s agreed to amend the contract so that December 2016 was the “last month”. Thus, December 2017 was no longer the “last month”, and therefore Michael’s had no basis under Lease 1 and 2 to keep rent for December 2017. I find the circumstances amount to Michael’s having used Cupcasions’ “last month’s rent” cheque, provided in October 2015, to cover the December 2016 rent.

22. I turn then to other arguments raised by Michael's. As noted, Cupcasions moved out of the Property at the end of December 2016. Michael's says Cupcasions took the first few days of January 2017 to repair wear and tear on the Property. However, Cupcasions said they were out and had the Property cleaned and repainted by 11 pm on December 31, 2017. Michael's did not address this in its reply submissions. I find nothing turns on which facts are accurate, bearing in mind Michael's does not claim "over holding" rent for January 2017.
23. What about the parties' collapsed deal to let Michael's have the proceeds of Cupcasions' refrigerator sale, to settle the December 2016 rent at issue? I infer Michael's relies upon the deal as evidence that its claim for the December 2016 rent is valid. Cupcasions said it made this offer as a good will gesture, because they no longer needed the refrigerator. The deal was that Michael's would keep the refrigerator at the Property and Michael's number was listed in the ad for its sale. I accept this evidence. I find that nothing turns on the collapsed refrigerator deal. Given Michael's later required Cupcasions to move it, which caused Cupcasions to incur storage costs before selling it, I find Cupcasions did not act unreasonably.
24. The applicant was unsuccessful. As such, in accordance with the tribunal's rules, I find the applicant is not entitled to reimbursement of its tribunal fees or claimed dispute-related expenses.

ORDER

25. The applicant's dispute is dismissed.

Shelley Lopez, Vice Chair