Civil Resolution Tribunal

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File: SC-2018-007370

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Xira Holdings Ltd. v. Mountain Sky Properties Inc.*, 2019 BCCRT 808

B E T W E E N :

Xira Holdings Ltd.

APPLICANT

A N D :

Mountain Sky Properties Inc.

RESPONDENT

A N D :

Xira Holdings Ltd.

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member: Trisha Apland

INTRODUCTION

1. This claim is about a terminated lease agreement for an aircraft hangar.

2. On September 29, 2016, the parties entered into a lease agreement, where the applicant, Xira Holdings Ltd. (Xira) leased an aircraft hangar from Mountain Sky Properties Inc., (Mountain Sky) for $3,500.

3. Xira says their lease agreement was terminated for cause on or before September 30, 2017. Based on the terminated agreement, Xira claims the return of its damage deposit in the amount of $3,500.

4. Mountain Sky says the lease agreement was terminated without cause, it did not release Xira from the agreement and it is not required to return the damage deposit. It says Xira abandoned the lease agreement, made changes to the hangar contrary to the agreement, caused damage, and did not return the hangar in its original condition.

5. Mountain Sky counter-claims. It claims Xira owes it $3,500 for an outstanding lease payment due October 1, 2017. In response, Xira says it had no payment obligation after the agreement was terminated with cause or alternatively, that Mountain Sky failed to mitigate its damages.

6. Xira is represented by Braden Messenger, its authorized representative. Mountain Sky Properties Inc. is represented by Dennis Skuter, its president.

JURISDICTION AND PROCEDURE

7. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 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.

8. 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.

9. 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.

10. Under tribunal rule 9.3(2), in resolving this dispute the tribunal may make one or more of the following orders:

    a. order a party to do or stop doing something;

    b. order a party to pay money;

    c. order any other terms or conditions the tribunal considers appropriate.

ISSUES

11. The issues in this dispute are:

    a. Was Xira entitled to terminate the lease and stop paying rent?

    b. Did Mountain Sky breach the contract by failing to repair the hangar doors?

    c. What are the appropriate remedies?

EVIDENCE AND ANALYSIS

12. Xira bears the burden of proving its claim, on a balance of probabilities. In the counterclaim, Mountain Sky bears this same burden. I have reviewed the evidence and submissions but refer to it only as needed to explain my decision.

Was Xira entitled to terminate the lease for cause or at all?

13. According to the lease agreement, the lessee, Xira agreed to lease a hangar from the lessor, Mountain Sky for a period of 36 months starting October 1, 2016 and ending September 30, 2019. In consideration for the lease, Xira agreed to pay Mountain Sky a monthly sum of $3,500 due on a 6-month payment schedule.

14. On August 3, 2017, Xira notified Mountain Sky that it was terminating the lease as of September 30, 2017, two years prior to the end of term. Xira did not specify its reason for termination at that time. On August 4, 2017, Mountain Sky notified Xira that it did not agree to terminate the lease early.

15. Section 10(A) of the lease agreement provides that the terms constitute the entire contract and terms not included in the agreement would not be recognized or enforced. I find the lease agreement was for a fixed term of 36 months and contained no express term that would allow a party to unilaterally terminate the lease prior to its expiry. Even absent such a term, the courts have found a presumption against adding unexpressed terms to a contract (see *Athwal v. Black Tob Cabs,* 2012 BCCA 107, and *Stewart v. Stewart,* 2019 BCSC 985). I find there is no implied term in the lease agreement. Absent a breach of the agreement by Mountain Sky, an issue I address below, I find Xira was not permitted to unilaterally terminate the lease and stop paying rent.

Did Mountain Sky breach the contract by failing to repair the hangar doors?

16. On August 18, 2017, Xira wrote Mountain Sky that it considered Mountain Sky's "lack of attention to the issues surrounding the doors, water and tugs demonstrate a

fundamental disfunction" and constituted a breach of the lease. However, in this dispute, Xira submits that it was primarily the lack of repair to the hangar doors that constituted the breach rather than the water or tug issues.

17. The evidence is that the water issue was not significant. It appeared the water in the hangar was just shut at the valves and needed to be turned on, with no resulting water problem. Regarding the tug, Xira had taken the position that a tug for aircraft movement was included in the lease. However, there is no mention of the tug in the terms of the lease agreement. I find Mountain Sky was not required to provide the tug as part of the lease.

18. Regarding the issues with the doors, the parties agree that in November 2016, Xira told Mountain Sky that it had issues with the hangar doors. Specifically, the doors "were difficult or impossible to open at times". The parties agree that Mountain Sky took steps to address the issues, including installing new door rollers in April 2017.

19. In June 2017, Mountain Sky sent a text message to Xira explaining that it "re-aligned the shims" as a "temp repair" but that a better repair would require more work. It said that if the Strata Corporation did not correct it shortly, it would do it itself. The following month, Xira told Mountain Sky that the doors were "working well" and the door issue was "finally resolved."

20. I find the lease agreement is silent on who was responsible to maintain the doors. The evidence demonstrates that both Xira and Mountain Sky took steps to repair the doors, though Mountain Sky took primary responsibility. The evidence also suggests the Strata Corporation might have had some obligation to repair the doors. The hangar was part of a strata lot and under the *Strata Property Act*, the Strata Corporation would have had an obligation to maintain common property. However, the evidence does not clearly establish whether the doors were in fact, common property.

21. In any event, to be entitled to repudiate (refuse to perform) the lease, Xira would need to demonstrate that Mountain Sky's conduct went to the very root of the lease

to make further performance impossible, or that it substantially deprived Xira of the whole benefit of the lease (see *Stearman v. Powers (c.o.b. Walkabout Casual Wear)*, 2014 BCCA 206). I find Xira has not met this burden.

22. I accept that functional hangar doors are fundamental to the operation of an aircraft that has to come in and out of a hangar. However, if the functionality of the doors over the winter deprived Xira of the whole benefit of the lease, I find that it would have promptly cancelled if it needed to access its aircraft, rather than months after the doors were fixed. Also, Xira provided no evidence of any damages or loss of business that it may have suffered over that period. Further, in August 2017, Xira sought to purchase the hangar, which suggests they wanted the hangar and it was not the functionality of the doors that was the main reason for termination.

23. At the time Xira terminated the lease, the doors were functional and had been functional for four months. I find that further performance was not impossible considering the doors functioned.

24. Xira has not established on the evidence that Mountain Sky fundamentally breached the lease agreement. Instead, I find that Xira breached the lease when it failed to make further payments as required under the lease terms.

What are the appropriate remedies?

Unpaid rent

25. Mountain Sky claims that Xira owes it $3,500 for unpaid rent for the month of October 2017. Mountain Sky also claims that Xira caused damage and made changes to the hangar without written consent. However, it does not claim any loss or provide evidence of damage as a result of these latter claims, and so I have not considered them in assessing damages.

26. In terms of the non-payment of rent, the *Commercial Tenancy Act* (CTA), applies to commercial leases of premises in British Columbia with respect to rights and duties of commercial landlords and tenants. The CTA provides certain injunctive relief to a

landlord for failure to pay rent that is only within the jurisdiction of the BC Supreme Court. Here Mountain Sky seeks monetary relief, which I find the tribunal has jurisdiction to grant.

27. The Supreme Court of Canada in *Highway Properties Ltd. v. Kelly, Douglas and Co.,* [1971] S.C.R. 562., held that there are certain options open to a landlord whose tenant has repudiated or abandoned a lease in its entirety. I find Mountain Sky elected one of the options available to it in *Highway Properties,* which was to terminate the lease and sue for accrued rent or damages.

28. A limitation on damages is the obligation on a landlord to mitigate, or prevent avoidable losses, after a tenant's breach. Xira argues that Mountain Sky failed to mitigate its damages by failing to properly secure and take possession of the premises after it knew the lease was terminated and Xira had vacated the premises. Mountain Sky says it had been advertising the hangar but was unsuccessful in filling the space. It says it was "able to collect a partial rental amount of $500 per month for the past five months".

29. In *Learmonth v. Letroy Holdings,* 2011 BCSC 143, the B.C. Supreme Court held that a landlord does not have an absolute obligation to mitigate its damages, it only needs to make reasonable efforts. Further, it is the tenant who bears the burden of proving that the landlord failed to make reasonable efforts to mitigate its damages. Xira did not challenge Mountain Sky's attempts to mitigate as cited above.

30. Mountain Sky is asking for only one month rent as damages, for the month following the termination of the lease. I find the lost rent is a reasonably foreseeable consequence of Xira's breach and that Mountain Sky had made reasonable efforts to mitigate its damages. I find Xira owes Mountain Sky one month's rent in the amount of $3,500.

Damage deposit

31. In terms of Xira's claim for reimbursement of the $3,500 damage deposit. Section 3.B of the lease agreement says that the damage deposit can only be used to repair damage to the hangar or to restore the hangar to its condition at the start of the lease. Absent these conditions, the balance of the damage deposit must be returned to the lessee within 30 days of the expiration or termination of the lease. While Mountain Sky claims Xira damaged the hangar, it provided no evidence to substantiate its claim. Since the parties both treated the lease as terminated, I find that Mountain Sky must reimburse Xira for the damage deposit.

Conclusion

32. Each party was successful in its claim. Since each claim was for the same amount of $3,500, I find they cancel each other out. Therefore, I make no order of payment with respect to these claims.

33. Under the Act, and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. Given my conclusion, I find the parties should bear their own tribunal fees and expenses.

ORDER

34. I order the parties' respective claims of $3,500 cancel each other out, such that no amount is payable to either party.

Trisha Apland, Tribunal Member