



Civil Resolution Tribunal

Date Issued: September 4, 2019

File: SC-2019-002538

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *1060776 BC Ltd. v. McConaghy et al*, 2019 BCCRT 1038

B E T W E E N :

1060776 BC LTD.

APPLICANT

A N D :

HELEN MCCONAGHY, JOSIEPINE SANTIAGO and ALLEN LILLEY

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Lynn Scrivener

INTRODUCTION

1. This is a dispute about a lease for a commercial property. The applicant, 1060776 BC LTD., says that it leased the property to the respondents, HELEN MCCONAGHY, JOSIEPINE SANTIAGO and ALLEN LILLEY, and that it has not received all of the rent payments. The applicant asks for an order that the

respondents pay it \$5,000 in outstanding rent. The respondents admit that not all of the lease payments were made, but deny that they owe the applicant the \$5,000 claimed.

2. The applicant is represented by Irfan Ali, who I infer is its principal. The respondents Ms. Santiago and Mr. Lilley are self-represented. Ms. Santiago also represents Ms. McConaghy.

JURISDICTION AND PROCEDURE

3. 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* (CRTA). 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.
4. 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.
5. 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.
6. Under tribunal rule 9.3(2), in resolving this dispute the tribunal may make one or more of the following orders, where permitted under section 118 of the CRTA:
 - 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.

ISSUE

7. The issue in this dispute is whether the respondents must pay the applicant \$5,000.

EVIDENCE AND ANALYSIS

8. In a civil dispute such as this, an applicant bears the burden of proof on a balance of probabilities. The parties provided evidence and submissions in support of their respective positions. While I have considered all of this information, I will refer to only that which is necessary to provide context to my decision.
9. The parties entered into a lease for a retail premises for a fixed 1-year term running from December 1, 2017 to November 30, 2018. They agreed that the rent would be \$2,300 per month plus goods and services tax. Section 5.1(a) of the lease said that the respondents would open the business to the public on or soon after the commencement date of the lease.
10. The respondents were unable to open their business in their desired timeframe. The respondents encountered difficulty with the municipal permitting and construction process. Preparing the premises for the intended use as a café proved to be more costly and time consuming than they had anticipated. The respondents paid rent for several months but did not pay the rent for August of 2018, at which time the café had not yet opened.
11. The applicant issued a demand for payment on August 2, 2018. The demand letter stated that, if payment was not received within 5 days, the applicant would “seek available legal remedies to secure payment of Outstanding Rent including re-letting the Premises or terminating the Lease and suing for damages”.
12. The respondents did not make the payment, but on August 7, 2018 sent the applicant an email message outlining what they described as options for proceeding on new terms.

13. On August 18, 2018, the applicant wrote to the respondents to advise that, under section 12.3 of the lease, it would re-enter the premises for the purpose of re-letting it. The applicant stated that the locks had been changed to protect the respondents' goods, and provided instructions for obtaining the new keys. The applicant stated that the respondents had 5 days to remove its property from the premises, or the property would be deemed to have been abandoned. The applicant reiterated its demand for payment of the outstanding rent.
14. The parties exchanged email messages about the applicant's intention to re-let the premises and the need for the respondents to remove their property from the premises. In an August 24, 2018 message, the applicant stated that the lease was not terminated and it was exercising its right to re-let the premises to mitigate its losses from the unpaid rent.
15. The respondents did not pay the outstanding balance or any future rent. They also did not remove their property from the premises. The applicant says the abandoned property negatively impacted its ability to re-let the premises. According to the applicant, it offered reduced rent and 2 months of free rent during a fixturing period to induce a new tenant to enter a lease. The applicant says the new tenant did not begin to pay rent until December 15, 2018.
16. The applicant submits that the respondents breached the lease by not making the required payments in the months of August, September, October and November of 2018. The 4 months of unpaid rent amounts to \$9,200 plus taxes. The applicant has abandoned its claims in excess of the tribunal's small claims monetary limit of \$5,000. The applicant also says that the respondents breached the lease by failing to open the premises for business.
17. The respondents admit that they did not make the payments described by the applicant. They say that they were unable to open their business without approval from the municipality and the health authority.

18. The respondents submit that the applicant misrepresented the premises and its suitability for use as a café. However, the business was advertised for sale by a former tenant, E, rather than the applicant. The evidence suggests that it was E who represented the premises as having an approved plan for use as a café and that a permit was ready to be issued. The evidence shows that the respondents had the chance to inspect the premises and do their due diligence before signing the lease. Further, the lease specifically states at section 5.1(a) that the applicant made no “express or implied agreement or representation and warranty of any kind” about the premises. I find that the applicant is not responsible for any alleged misrepresentations about the premises.
19. There is no dispute that the respondents defaulted on the lease by not making the required payments. The consequences of a default are set out in section 12.1 of the lease. This section states that, if rent is not paid as required, the applicant may take possession of the premises and sell the respondents’ property. In addition, section 12.3 states that, in the event of a default, the applicant may enter the premises without terminating the lease and re-let the premises on terms that the applicant considers reasonable. Under this section, the respondents would be responsible for any shortfall between the rent received and the amount due under the lease.
20. It would appear that the respondents were under the impression that they were somehow released from their obligations under the lease once the applicant re-let the premises. However, in its correspondence, the applicant clearly stated that the lease was not terminated and that the respondents remained responsible for the amounts payable under that lease. This is consistent with the lease terms to which the respondents agreed. In addition, the new tenant did not begin to pay rent until after the term of the respondents’ lease expired, so there were no rents to deduct from the lease payments.
21. The fact that the respondents were willing to continue their efforts to open their business despite the setbacks they faced does not alter their contractual responsibilities under the lease. The applicant was not obligated to re-negotiate the

lease or provide new terms due to the unexpected costs and delays associated with the project. Under the terms of the lease, the applicant was entitled to re-let the premises and seek damages from the respondents. I find that the applicant has established that it sustained losses in excess of \$5,000 as a result of the respondents' failure to make all of the payments under the lease. Accordingly, the applicant is entitled to the \$5,000 it claims.

22. I acknowledge the respondents' submission that the new tenant is using its property left on the premises which has a value of approximately \$4,000. The respondents did not make a counterclaim and did not provide evidence of the property's value that would support the consideration of an equitable set-off.
23. In addition to the \$5,000 in damages, I find that the applicant is also entitled to pre-judgment interest under the *Court Order Interest Act*. Calculated from the due dates of the respective missed payments, this amounts to \$92.30.
24. Under section 49 of the Act, and tribunal rules, the tribunal generally will order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I find the applicant is entitled to reimbursement of \$175.00 in tribunal fees.

ORDERS

25. Within 30 days of the date of this order, I order the respondent to pay the applicant a total of \$5,267.30, broken down as follows:
 - a. \$5,000 in contractual damages,
 - b. \$92.30 in pre-judgment interest under the Court Order Interest Act, and
 - c. \$175.00 in tribunal fees.
26. The applicant is entitled to post-judgment interest, as applicable.

27. Under section 48 of the CRTA, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunal's final decision.
28. Under section 58.1 of the CRTA, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

Lynn Scrivener, Tribunal Member