Date Issued: September 6, 2019

File: SC-2019-003181

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Euro Class Motors Inc v. Wingold Construction Ltd. et al*, 2019 BCCRT 1056

B E T W E E N :

EURO CLASS MOTORS INC

APPLICANT

A N D :

WINGOLD CONSTRUCTION LTD. and TURNER, MEAKIN MANAGEMENT COMPANY LTD.

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Micah Carmody

INTRODUCTION

1. This is a dispute about whether a landlord can charge a tenant for a new gas heater installed near the end of a commercial lease.

2. The applicant Euro Class Motors Inc (Euro) leased commercial property in a complex owned by the respondent Wingold Construction Ltd. (Wingold). The other respondent, Turner, Meakin Management Company Ltd. (Turner), is Wingold's property manager and agent.

3. Euro seeks an order for $4,879.98: a refund of its initial $3,400 deposit plus a $1,479.98 credit. Wingold acknowledges the deposit (which it values at $3,400.64) and the credit, but says it only owes Euro $504.70 after deducting $4,500 for the new heater.

4. Euro is represented by Walter Polancic. Wingold is represented by Jeffrey M. Goldberg. Turner is represented by Kelly Kellogg. I infer that the representatives are principals or employees of their respective companies.

JURISDICTION AND PROCEDURE

5. 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.

6. 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.

7. 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.

8. 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

9. The issue in this dispute is whether Wingold was entitled under the terms of the lease to recover from Euro the cost of the new gas heater.

BACKGROUND FACTS

10. The facts are substantially not in dispute. Euro leased property from Wingold in Langley, BC for its automobile repair shop. Euro was Wingold's tenant from sometime in 2011 until December 31, 2018. It paid a $3,400 deposit. The only written lease agreement in evidence was a 3-year term ending April 30, 2018 (lease). Subsequently the tenancy became an "overholding" month-to-month tenancy with the same terms and conditions but increased rent. Euro moved out in December 2018 and the parties conducted a move-out inspection on January 3, 2019.

11. Under the lease, Euro agreed to pay Wingold:

    a. Monthly rent.

    b. Additional rent consisting of the tenant's portion of the building operating costs, insurance and municipal tax costs.

    c. Heating, ventilation and air conditioning (HVAC) costs attributable to the leased premises.

    d. Improvements required by law or competent authority.

12. The lease provides that additional rent is estimated by the landlord in advance, and paid by the tenant in monthly installments. Within 180 days of the end of each lease year, additional rent is reconciled and adjusted if necessary.

13. Wingold provided Euro with a 'common area maintenance reconciliation' for November 1, 2017 through October 31, 2018. I infer that this was the annual reconciliation of 'additional rent' and 'HVAC costs'. It resulted in a credit to Euro of $1,479.98. Wingold provided another reconciliation for the last 2 months of the Euro's lease, resulting in $4,375.88 owing after accounting for pre-payment. The largest expense was $4,500 under the heading 'repairs and maintenance', which was the full cost (less GST for unexplained reasons) of the gas heater replacement. Wingold took the $4,375.88 it calculated Euro owed 2018 and deducted the $1,479.98 credit and the $3,400.64 deposit to arrive at a refund of $504.70.

14. Turner attempted to mail the refund cheque but the mail was returned for an incorrect postal code. Turner submits it still has the $504.70 cheque because Euro did not provide a correct mailing address.

15. Although Euro originally claimed $4,879.98, I find that it made a math error by simply adding its $3,400 deposit and the $1,479.98 credit. The proper approach to calculating Euro's potential refund is that taken by Wingold and Turner, resulting in a potential refund of $5,004.70 when the $4,500 heater is included. Accordingly, I consider it appropriate to amend the claim to $5,000.00, the tribunal's small claims monetary limit.

The heater replacement

16. Euro's heating system is serviced on an annual maintenance contract between Turner and Hytek Mechanical (Hytek). The contract includes 1 inspection per year for each of 8 heaters in service for various tenants in the complex, including Euro. The maintenance costs were passed to tenants through the common area maintenance charges. Turner says the heating unit failed its 2018 inspection due to a cracked heat exchanger. It says Hytek followed all "regulatory and code

requirements" and shut the unit off. However, Turner did not explain what those regulatory and code requirements were and did not put them in evidence.

17. Hytek's October 1, 2018 report says, "the old Olsen unit heater for the auto mechanic shop has a crack in the heat exchanger and should be replaced. The customer in that suite let me know that he was moving out in December. So that would be a great time to change it out before the next renter moves in." The report does not state that the unit was shut off.

18. On October 12, Hytek submitted a proposal to Turner to install a new gas heater. The proposal said the existing gas heater "needs to be replaced." The existing heater model had a heating capacity of 130,000 BTU and was no longer in production. The next size up was 145,000 BTU.

19. A November 20, 2018 invoice confirmed that Hytek supplied and installed the new 145,000 BTU on Turner's instructions.

20. Euro disputes the need to replace the heater. It says it had not experienced a loss of heat or any other problems. It says the unit was still working, and Hytek did not shut off the heater or the gas. Mr. Polancic says he was working into the late evening hours (presumably in October and November 2018) and experienced the warmth of the heater.

21. Euro also takes issue with the timing of the heater replacement, with one month left on its lease, and the lack of communication from Turner about the need for replacement and responsibility for the costs. It argues that Wingold derives a significant benefit in upgrading the heater which will help it attract a new tenant.

22. Although there may not have been immediately apparent problems with the heater, I find that Turner reasonably relied on its contractor's advice that the heater needed to be replaced. Euro provided no evidence to challenge the contractor's assessment of the cracked heat exchanger, and no evidence about the ability of a heater to safely function with a cracked heat exchanger.

23. Euro also argues that the heater was properly maintained and not damaged by Euro, and therefore its replacement was due to ‘wear and tear’ and Euro should not be responsible.

24. The respondents argue that under the terms of the lease, which they describe as a ‘triple net lease’, the tenant is responsible for all costs to service, maintain, and if necessary, replace any of the mechanical systems within the premises. As the warehouse heater that was replaced serviced only Euro’s premises, the respondents submit that Euro must pay the cost of replacement. The heater replacement was expensed in the year it was incurred, and because Euro did not end its tenancy until December 31, the respondents say Euro is responsible for the full replacement cost.

ANALYSIS

25. In a civil claim such as this, the applicant must prove its claim on a balance of probabilities. I have considered all the parties’ evidence and submissions, but only refer to what is necessary to explain and give context to my decision.

26. Under article 6.1 of the lease, the tenant bears responsibility for nearly all the costs associated with operation, maintenance and repair of the premises. The exceptions are reasonable wear and tear, and repairs for which the landlord is responsible under article 6.2.

27. Under article 6.2 the landlord is responsible for repair and replacement of property used in common by the tenants, but the costs of such work is part of ‘building operating costs’. The landlord is also responsible for maintaining the tenant’s HVAC system, but such HVAC costs form part of the tenant’s additional rent.

28. Two definitions are essential and reproduced here with my emphasis in bold:

> “HVAC costs” means the cost of heating, ventilating and air conditioning, and includes but is not limited to cost of fuel, electricity, operation of air distribution and cooling equipment, labour, materials, **non-capital repairs**, maintenance

> (including cleaning of ducts), service contracts and other such costs reasonably attributable to the heating, ventilating or air conditioning of the Leased Premises[.]”
>
> “Building Operating Cost” includes the total of all expenses in the complete operation and maintenance of the Building and the Property and shall include, without limiting the generality of the foregoing, Capital Tax, the costs of repairs carried out by the Landlord, […] the cost of heating, cooling and ventilating all space both rentable and non-rentable […] the cost of all repairs and replacements to the Building or services including elevators […] **but shall not include** […] **expenses properly chargeable to capital account**[.]

29. The objective of interpreting a contract is to discover and give effect to the parties' true intentions as expressed in the document as a whole at the time the contract was made. In the absence of ambiguity, the plain or literal meaning of the words, read in light of the entire agreement and its surrounding circumstances, should be adopted unless doing so would result in an absurdity or create an inconsistency with the rest of the contract. (*Canadian Encyclopedic Digest* at para. 552)

30. Euro argues that the gradual deterioration of the heater was ‘reasonable wear and tear’. I return to this argument below after considering article 6.2.

31. The heater formed part of Euro’s HVAC system. The question therefore is whether the heater replacement was properly part of either building operating costs or HVAC costs, both of which are also charged to Euro.

32. Both definitions contain a distinction between landlord costs and tenant costs based on capital expenses or repairs. The definition of HVAC costs includes ‘non-capital repairs’, which suggests that ‘capital repairs’ are not part of HVAC costs and therefore are not properly charged to the tenant. Similarly, the definition of building operating costs excludes “expenses properly chargeable to a capital account.”

33. Accordingly, I find that the question boils down to whether the replacement heater was a capital expense (a capital repair or an expense properly chargeable to a capital account) or a non-capital repair or maintenance expense. The terms ‘capital repair’, ‘non-capital repair’ and ‘capital account’ are not defined in the lease.

34. The dividing line between a capital expense or betterment and a repair or maintenance expense is not black and white. Neither party provided argument or evidence about the meaning of these terms. However, there is a substantial body of case law on the subject.

35. In *Riocan Holdings Inc. v. Metro Ontario Real Estate Limited*, 2012 ONSC 1819 (affirmed 2012 ONCA 839), a landlord attempted to charge a tenant for common parking lot repaving. The lease provided that the tenant would pay a proportionate share of common expenses which included repairs and maintenance to various items, including paved areas. The exception was "expenditures which by accepted accounting practice are of a capital nature". The court found that the parking lot resurfacing, which cost $431,000 and was expected to last 20 years, was a betterment or capital cost and not a repair. The court also found it was noteworthy that the landlord amortized the cost over 20 years although it was not required to, which suggested the cost was a capital cost.

36. Here, the landlord did not amortize the heater's cost. However, that is an accounting decision that is not determinative of the parties' obligations under the lease. In *Riocan*, the court looked to authoritative accounting texts and found that whether an expenditure should be treated as a betterment or repair is based on whether the 'service potential' of the asset at issue was 'enhanced' by the expenditure (making it a betterment) or just 'maintained' (making it a repair). The court found that the asset at issue was the specific thing the work was being done to (the parking lot as opposed to the whole complex) and that the work significantly extended the life of the parking lot. Here, the asset is the heater, and I find that its service potential is enhanced because the life expectancy of the new heater, though not in evidence, is certainly greater than the old heater with a cracked heat exchanger. The new heater also has a greater heating capacity (145,000 BTU vs 130,000 BTU). It follows that heater replacement is a capital expense rather than a non-capital repair.

37. In *Minister of National Revenue v. Haddon Hall Realty Inc.,* 1961 CanLII 93 (SCC), the Supreme Court of Canada remarked that a capital expenditure is one made

once and for all to bring into existence an asset for the enduring benefit of a trade. In holding that the landlord's expenditures to replace fridges, stoves and blinds were capital outlays, the court said that expenditures to replace assets that have become worn out or obsolete are different from ordinary annual expenditures for repairs. This reinforces that replacement of a heater is not a repair.

38. In *Di Fruscia v. The Queen*, 2007 TCC 310, the Tax Court of Canada held that the purchase of a new furnace was a purchase of a capital asset. The court reasoned that "the new furnace replaced the old furnace, but without a new furnace the use and enjoyment of the building would be affected. A new asset was acquired." The furnace replacement was contrasted with the owner's repairs to a floor and exterior walls, which were not replacements and simply made the building suitable for normal use. In my view, there is a similar distinction in the definition of HVAC costs, which refers to non-capital repairs, which would include repairs that simply keep the HVAC system functioning at its normal level.

39. If my conclusion that replacing the heater was a capital repair and an expense properly chargeable to a capital account is incorrect, I would nonetheless find the tenant not responsible for the cost because of the wear and tear exception. In another case dealing with parking lot resurfacing, *Parsons Precast Inc. v. Sbrissa*, 2012 ONSC 6098 (affirmed 2013 ONCA 558), the lease in question did not contain the exception for capital expenditures. Instead, the question came down to whether the total repaving of the parking lot was 'maintenance' or 'repair (reasonable wear and tear… excepted)'. The court referred to common definitions of 'maintenance' as 'keeping the property up' and found the parking lot pavement was not 'kept up', rather it was totally replaced. The court also found that the parking lot pavement only needed replacing because of reasonable wear and tear, for which the tenant was expressly not responsible.

40. Here, as in *Parsons*, the lease expressly makes the tenant not responsible for repairs resulting from reasonable wear and tear. The Hytek report said the heat exchanger had cracked. Turner submitted that the heater had surpassed its life

expectancy. There was no suggestion the tenant did anything wrong. Based on that evidence, I find that the need to replace the heater was attributable to reasonable wear and tear. The heater is similar to the pavement example because it was not 'kept up', it was entirely replaced with a better version.

41. The court in *Parsons* also remarked that if its conclusions were in error, the tenant's share of the paving costs ought to be amortized over the expected life of the pavement, with the resulting figure divided by 12 to create a monthly figure for which the tenant was liable only for the remaining months until the lease expired. I agree and would apply the same reasoning here. To hold otherwise would see the tenant pay the entire cost of a new, upgraded heater of which it received the benefit for only a little over a month.

42. In conclusion, I find that the new heater was a new asset. I find that replacing the heater was not a 'non-capital repair' and was an expense properly chargeable to a capital account. Accordingly, it was excluded from both building costs and HVAC costs and was the landlord's responsibility under article 6.2 of the lease. Alternatively, replacement of the heater was a result of reasonable wear and tear, leading to the same result.

43. I find that Wingold was not entitled to deduct the $4,500 cost of heater replacement from the monies it owed to Euro. As Wingold does not dispute that it owed a refund of $504.70, I order Wingold to pay Euro $5,000.00, the tribunal's small claims limit.

44. The *Court Order Interest Act* applies to the tribunal. Euro is entitled to pre-judgement interest on the $5,000 refund from the day after the lease ended, January 1, 2019, to the date of this decision.

45. Under section 49 of the CRTA and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I find Euro is entitled to reimbursement of $175 in tribunal fees. Euro did not claim any dispute related expenses.

ORDERS

46. Within 14 days of the date of this order, I order Wingold to pay Euro a total of $5,241.25 broken down as follows:

    a. $5,000.00 refunded under the lease.

    b. $66.25 in pre-judgment interest under the *Court Order Interest Act*, and

    c. $175.00 in tribunal fees.

47. Euro is entitled to post-judgment interest, as applicable.

48. 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.

49. 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.

Micah Carmody, Tribunal Member