



Civil Resolution Tribunal

Date Issued: March 31, 2020

File: SC-2019-008243

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Kafka's Organic Inc. v. HoliDrink Corporation*, 2020 BCCRT 352

BETWEEN:

KAFKA'S ORGANIC INC.

APPLICANT

AND:

HOLIDRINK CORPORATION

RESPONDENT

AND:

KAFKA'S ORGANIC INC.

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Rama Sood

INTRODUCTION

1. This dispute is about a commercial lease. The applicant and respondent by counterclaim, Kafka's Organic Inc. (Kafka), manufactures pet food. It leased a commercial kitchen from the respondent and applicant by counterclaim, HoliDrink Corporation (HoliDrink). Kafka says HoliDrink breached the parties' lease by denying access to the kitchen. Kafka seeks \$1,856 for a refund of its damage deposit, key and FOB deposits, balance of 1 month's rent, and spoiled inventory.
2. HoliDrink says Kafka breached the lease by not obtaining liability insurance, using equipment without consent, using the kitchen outside of the scheduled times, not cleaning up after use, and not complying with HoliDrink's restriction against frying meat. HoliDrink counterclaims for \$3,342.30 for liquidated damages, the cost of changing the locks on the kitchen, and the cost of new keys.
3. Kafka is represented by SF, a principal or employee.
4. HoliDrink is represented by BL, a principal or employee.

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. Where permitted by section 118 of the CRTA, in resolving this dispute the tribunal may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.

Injunctive Relief

9. In addition to its monetary claims, Kafka requested an order that BL not contact it or interfere with its business. Likewise, HoliDrink requested an order that SF stay away from its business and properties.
10. An order requiring someone to do something, or to stop doing something, is known as “injunctive relief”. Injunctive relief is outside the tribunal’s small claims jurisdiction, except where expressly permitted by section 118 of the CRTA. There is no relevant CRTA provision here that would permit me to grant the injunctive relief sought by either of the parties. I decline to grant the requested injunctive remedies.

ISSUE

11. The issue in this dispute is whether either party breached the lease and, if so, what remedy is appropriate.

EVIDENCE AND ANALYSIS

12. In its civil claim, the applicant Kafka bears the burden of proof on a balance of probabilities. HoliDrink bears the burden of proving its counterclaim against Kafka. I have only referenced the evidence and submissions as necessary to explain my decision.

13. On August 9, 2019 the parties signed a six month part-time commercial kitchen rental agreement (lease). It included the following terms:
- a. The lease term was 6 months, from September 16, 2019 to March 15, 2020. The monthly rent was \$800 (clause 1).
 - b. Kafka was required to pay \$800 for one month advance rent, an \$800 refundable security and damage deposit, and \$110 for key and FOB deposits. The deposits had to be refunded to Kafka within 30 days of the lease's termination. HoliDrink could deduct costs for key and FOB replacements and for damage repair and cleaning expenses caused by Kafka (clause 2).
 - c. Kafka had limited use of the kitchen's appliances and equipment. The items listed in the lease that Kafka could use did not include HoliDrink's pots and pans (clause 3).
 - d. Kafka could use the kitchen on Tuesdays and Wednesdays from 2 pm to 7 pm, up to 10 hours per week. Any other days and times had to be agreed to by the parties in advance and in writing. Kafka would be charged \$20 per hour for additional hours (clause 4).
 - e. If Kafka's behavior was disruptive, HoliDrink could terminate the lease immediately without notice and Kafka would forfeit the deposit. Disruptive behavior included arguing, acting menacing, discourteous behavior, and unauthorized use of another's property (clause 6).
 - f. Kafka must clean up after itself and dispose of its garbage. If it did not, HoliDrink could clean and charge any cleaning fees back to Kafka (clause 8).
 - g. Kafka had to maintain liability insurance that named HoliDrink as the additional insured (insurance). It had to submit a copy of the insurance coverage and its certificate of incorporation to HoliDrink (clause 10).
 - h. HoliDrink could terminate the lease before March 15, 2020 without notice if Kafka committed an "unlawful act" in the kitchen or breached any of the terms

and conditions in the lease. However, there was no provision for Kafka to terminate the lease (clause 12).

14. Kafka inspected the kitchen before it signed the lease. HoliDrink says it pointed out a large sign on the exhaust hood above the stove that stated “Cooking causing grease-laden vapours is not allowed, exhaust system is designed for steam and heat removal only”. HoliDrink says it informed Kafka that Kafka could not fry meat in the kitchen because it was against the City and strata bylaws since the exhaust hood did not have a fire suppression system. This restriction was not mentioned in the lease. HoliDrink says Kafka agreed to this term. I find that Kafka knew or ought to have known that it could not cook items that produced grease vapours.
15. Kafka paid HoliDrink \$800 monthly rent from September 16, 2019 to October 15, 2019, an \$800 security damage deposit, and \$110 for key and FOB deposits. Kafka started using the kitchen on September 24, 2019 although it did not have insurance.
16. HoliDrink asked Kafka to obtain insurance on August 19, 2019, September 24, 2019, and October 2, 2019. Kafka admits that HoliDrink repeatedly asked for proof of insurance. In an August 27, 2019 email Kafka promised to provide proof of insurance when SF picked up the keys, but never did. It also repeatedly told HoliDrink that it was in the process of obtaining insurance.
17. Kafka says it did not obtain insurance because:
 - a. HoliDrink waived this term of the lease since it accepted the rent and deposit payments, and permitted Kafka to use the kitchen without insurance on September 24, September 30, and October 2, 2019.
 - b. HoliDrink did not provide a deadline for obtaining insurance.
 - c. It was difficult for a pet food manufacturer to obtain insurance. Kafka did not explain what the difficulty was.
 - d. Kafka was in the process of obtaining insurance and comparing quotes when HoliDrink terminated the lease.

18. I do not accept any of Kafka's reasons for not obtaining insurance. I find that HoliDrink did not waive Kafka's obligation to obtain insurance. It repeatedly asked Kafka to provide proof of insurance both before and after Kafka started using the kitchen. I also find that HoliDrink did not have to provide Kafka with a deadline to obtain insurance since clause 10 of the lease stated that Kafka "shall maintain" insurance. I find this means that Kafka was required to have insurance from the date the lease commenced, being September 16, 2019.
19. Kafa also informed HoliDrink on September 24, 2019 and October 2, 2019 that it was comparing insurance quotes and would provide proof of insurance shortly. I find that Kafka had the opportunity to purchase insurance since at least September 24, 2019 and chose not to do so. I find this contradicts Kafka's statement that it was difficult to obtain insurance and that, instead, Kafka was trying to obtain a more favorable rate.
20. In an October 3, 2019 email to Kafka, HoliDrink stated Kafka could not use the kitchen until Kafka provided a valid insurance policy. HoliDrink also included a list of other issues about Kafka's use of the kitchen which are discussed below. Kafka responded that it would terminate the lease on October 15, 2019 if HoliDrink continued to have these concerns and was inflexible. Kafka also stated that it would start looking for a new space. The parties met on October 3, 2019 but were unable to resolve their issues.
21. Kafka says HoliDrink's breached the lease on October 3, 2019 when it stated that Kafka could not use the kitchen without insurance. However, HoliDrink says it was Kafka who terminated the lease during the October 3, 2019 meeting and again by email after the meeting. I find that Kafka breached clause 10 of the lease when it did not obtain insurance. I also find the lease did not allow HoliDrink to restrict use of the kitchen until Kafka rectified the breach. Consequently, I find HoliDrink terminated the lease on October 3, 2019 under clause 12 when it restricted Kafka's use of the kitchen due to Kafka's breach and Kafka accepted the termination.

22. HoliDrink says Kafka also breached the lease by using HoliDrink's cooking pan without consent, using the kitchen outside of the scheduled times, not cleaning up, and not complying with HoliDrink's restriction against frying meat. Kafka admits it committed these actions. I find these actions breached clause 4, clause 6, and clause 8 of the lease. Although the restriction for frying meat was not explicitly stated in the lease, I find that it was disruptive behavior because it disrupted the use of the kitchen in clause 6. However, I find HoliDrink did not restrict access to the kitchen and terminate the lease because of these actions but instead raised them as concerns.

Damages

23. Since the lease was terminated on October 3, 2019, Kafka seeks a refund of \$400 of the \$800 it paid in rent for September 16, 2019 to October 15, 2019 (prorated rent). I find that since Kafka breached the lease and chose not to remedy it by purchasing insurance, HoliDrink is entitled to keep the prorated rent. I dismiss Kafka's claim for the \$400.

24. Kafka seeks \$110 for return of the key and FOB deposits. Kafka refused to return the key and the FOB at the October 3, 2019 meeting unless HoliDrink first refunded \$110 in cash, which HoliDrink did not have. On October 8, 2019 Kafka refused to accept \$110 in cash from HoliDrink in exchange for the key and FOB. Instead Kafka wanted the prorated rent, the damage deposit, and key and lock deposits refunded before it would return the key and FOB. On October 9, 2019, HoliDrink changed the locks and made new keys for its other tenants. HoliDrink provided receipts and seeks \$142.30 for these expenses.

25. I find that Kafka was not entitled under the lease to withhold the key and FOB until it received a refund of the deposits, and prorated rent. Clause 2 of the lease stated HoliDrink had to refund the damage, key, and FOB deposits to Kafka within 30 days of termination of the agreement subject to reductions for the cost of replacing the lock and keys and costs of damage repair and cleaning expenses caused by Kafka.

Since the lease was terminated on October 3, 2019, HoliDrink had to refund any deposits by November 2, 2019.

26. I find clause 2 implied that Kafka had to first return the key and FOB before being entitled to a refund of the key and FOB deposits. To find otherwise would defeat the portion of the clause that allowed HoliDrink to subtract the cost of replacing the lock and key. I find that it was reasonable for HoliDrink to replace the locks and keys since Kafka made it clear it would only return the key and FOB after HoliDrink refunded the prorated rent and deposits. I find HoliDrink is entitled to \$142.30 for the cost of the new locks and keys. After adjusting for the \$110 key and FOB deposit paid by Kafka, I award HoliDrink \$32.30. I dismiss Kafka's claim for \$110.
27. Kafka seeks a refund of \$800 for the damage deposit and HoliDrink seeks to keep the deposit. HoliDrink says that the parties agreed at the October 3, 2019 meeting that HoliDrink would keep the prorated rent and the damage deposit. In exchange, Kafka could retrieve its equipment from the kitchen and terminate the lease early. Kafka has not disputed HoliDrink's statement. However, I give no weight to this discussion since neither party argued there was an enforceable settlement agreement and each is seeking damages.
28. Turning then to the lease, the only clauses that addressed the damage deposit were clause 2 and clause 6. Since HoliDrink did not claim costs for damage repair or cleaning expenses, I find clause 2 does not apply.
29. Clause 6 of the lease stated HoliDrink was entitled to terminate the lease without notice and Kafka would forfeit the deposit if Kafka's behavior was disruptive. As discussed above, Kafka breached clause 6 since it used HoliDrink's cooking pay without consent and fried meat. By doing so, Kafka forfeited the damage deposit. I find that Kafka is not entitled to a refund of the \$800 damage deposit. I also find that HoliDrink is entitled to keep the \$800 damage deposit.
30. Kafka says it had to dispose of \$600 worth of half-cooked ingredients because HoliDrink terminated the lease and denied access to the kitchen. Kafka provided

receipts and photos of the ingredients, including photos of the ingredients being transferred to a garbage bag by SF. HoliDrink says that the damaged ingredients were Kafka's own fault. I infer from the evidence that Kafka removed the ingredients from the kitchen on either October 3, 2019 or October 4, 2019. I find that Kafka could still access the kitchen after October 3, 2019 since it picked up its stand mixer on October 8, 2019. Kafka did not explain why it immediately disposed of the ingredients or whether it made attempts to preserve the ingredients by, for instance, looking for another storage place. I find that Kafka has failed to show it attempted to mitigate its losses and I dismiss its claim for \$600.

31. HoliDrink seeks \$3,200 for rent for the balance of the lease (October 16, 2019 to March 15, 2020). I am bound by the decision of the Supreme Court of Canada in *Highway Properties Ltd. v. Kelly, Douglas and Co.*, [1971] S.C.R. 562., that if a tenant breaches a lease, the landlord can terminate the lease but must give notice to the tenant if it intends to sue for unpaid rent for the balance of the lease term. I find there is no evidence HoliDrink gave such notice to Kafka. I dismiss HoliDrink's claim for \$3,200.
32. The *Court Order Interest Act* applies to the tribunal. HoliDrink is entitled to pre-judgement interest on the award for damages from October 3, 2019, the termination date of the lease, to the date of this decision. This equals \$0.31.
33. 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 see no reason in this case not to follow that general rule. Given that HoliDrink was largely successful, I find it is entitled to reimbursement of \$125 in tribunal fees. It did not claim any dispute-related expenses. I dismiss Kafka's claim for tribunal fees.

ORDERS

34. Within 30 days of the date of this order, I order Kafka's Organic Inc. to pay HoliDrink Corporation a total of \$157.61, broken down as follows:

- a. \$32.30 for damages,
 - b. \$0.31 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$125 in tribunal fees.
35. HoliDrink Corporation is entitled to post-judgment interest, as applicable.
36. I dismiss HoliDrink Corporation's remaining claims. I dismiss Kafka's Organic Inc.'s claims.
37. 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.
38. 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.

Rama Sood, Tribunal Member