Citation: *New Oriental Restaurant* v. *Smeeton Automotive Ltd.,* 2007 YKSM 3

Date: 20070920
Docket: 07–S0031
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON
Before: His Honour Judge Barnett

New Oriental Restaurant Ltd.

Plaintiff

v.

Smeeton Automotive Ltd.

Defendant

Appearances:

Ms. Hsiao Hung Lin	Representing the Plaintiff
Ms. Linda Smeeton	Representing the Defendant

REASONS FOR JUDGMENT

[1] The plaintiff corporation is the owner of commercial premises in Whitehorse. Ms. Lin and her husband are the principal shareholders. They operate a restaurant in part of the building there and other parts of the building are leased to various tenants.

[2] The premises were purchased by the plaintiff in 1995 from 7958 Yukon Ltd., whose principal shareholder was Mr. Lam. That company had leased part of the building to the defendant corporation, the principal shareholders of which are Linda and Chris Smeeton.

[3] The defendant corporation carries on business under the trade name “Bumper to Bumper” and sells automotive parts and accessories, ATVs, and snow machines. This business had previously been carried on for many years by Mr. Lam’s company.

[4] The original lease is exhibit 1; it gave the defendant the right to occupy 6300 square feet in the building and to carry on a “retail sales” business only. But Mr. Lam’s company had constructed a fenced storage compound in the parking area upon the land and although there is no mention of this compound in the lease, the defendant continued to occupy and use it, a situation which the plaintiff apparently tolerated after becoming the owner/landlord.

[5] The plaintiff and defendant corporations renewed the lease for five years in 2000 and for a further year in 2005. The renewal documents, exhibits 2 and 3, do not mention the compound.

[6] When the lease was renewed in 2005 the parties anticipated that the defendant would vacate the premises when the lease ended on August 13, 2006. The defendant had purchased a building from Metro Chrysler Ltd., which, in turn, was planning to move to a new location that was then being developed. The principal shareholder of Metro Chrysler Ltd. is Mr. Lam.

[7] In May 2006 it was apparent that Metro Chrysler’s move would be delayed. Mr. Lam therefore negotiated an agreement – exhibit 4 – with Ms. Lin and the defendant’s tenancy was extended until September 15, 2006. When Metro Chrysler was not then able to move, Ms. Lin and Mr. Lam agreed upon terms extending the defendant’s tenancy to October 15, 2006 and then to October 22, 2006. These agreements were not reduced to writing but their terms are not in dispute.

[8] The defendant’s tenancy was extended, some additional benefit was provided to the plaintiff by Metro Chrysler, the defendant was to pay the usual monthly rental – $6,912.05 – for the period September 16th to October 15th, and a further amount proportional to a week’s rent for the period October 16 – 22.

[9] Ms. Smeeton testified. She says that the premises were essentially vacated on October 22, 2006. This testimony is repeated in identical affidavits sworn by two of the defendant's employees but the defendant chose not to have those persons attend at the courthouse on September 10th or 14th when this case was tried.

[10] Ms. Lin was the plaintiff's only witness. She says that she was away from Whitehorse for a few days and returned in the evening on October 24, 2006. She says that the defendant was then actively still in the process of moving out. She further says that she had previously offered to allow the defendant to continue occupying the premises for a few days beyond October 22nd upon payment of $3,000, but Ms. Smeeton did not accept this offer.

[11] The stories told by Ms. Lin and Ms. Smeeton cannot be reconciled. There is however, other evidence to be considered.

[12] The Smeetons were clearly looking to Mr. Lam to negotiate their tenancy extensions and to cover the costs of any premiums which the plaintiff required. He was unwilling to continue this role and Ms. Smeeton clearly considered it was not required that the defendant satisfy Ms. Lin's greedy demands. The testimony of Mr. Budzinski however satisfies me that Ms. Lin had good reason for wanting the premises vacated and requiring some extra consideration when the defendant wanted to extend its occupation of the premises.

[13] Ms. Smeeton says that the premises were vacated on Sunday, October 22, 2006, but it is not disputed that the keys for the premises were not then returned. I find that they were just left in the premises – probably on October 29th or perhaps very late in the day on October 28th. Ms. Smeeton says this is of no real significance, but I cannot agree. I believe that s. 2.1(u) of the lease deserves some consideration in these particular circumstances and believe that if the defendant really did vacate the premises on Sunday, October 22nd, the keys would have been returned very promptly.

[14] I find that the premises were not vacated until on or about October 29th. In these circumstances the defendant was an overholding tenant and the informal agreement reached between Ms. Lin and Mr. Lam is irrelevant. As an overholding tenant, the

defendant became responsible for one month's rent – from October 16 to November 15, 2006. The monthly rental (including GST) was $6,912.05 and only $1,590.70 was paid. I therefore believe the plaintiff was entitled to demand payment of a further $5,321.35. The plaintiff's claim is for a lesser sum and judgment will be for that amount, $4,772.10. (I should perhaps note that if I had regard to the informal agreement made between Ms. Lin and Mr. Lam, I would have granted judgment to the plaintiff for a full month's rent from October 22, 2006.)

[15] The plaintiff claims a total of $680 for costs incurred and work done to clean up the premises after the defendant moved out. These claims are justified. The defendant made only token efforts at cleaning up as they moved out. Ms. Clough's work was necessary and her bill of $500 was reasonable. The sump should also have been cleaned out by the defendant and I am certain that work will cost more than $180 when the plaintiff does have it "professionally" completed.

[16] The defendant also claims the actual cost of having the compound dismantled and removed; $1,802.00. The evidence concerning this aspect of the case is unsatisfactory. Ms. Lin says she and her husband were angry when the Smeetons expanded the compound but they did not make any record of the discussions which I am told they had with Mr. Smeeton. Mrs. Smeeton says they repaired the compound and made it stronger after some thieving happened, but she denies they expanded it or ever agreed to remove it. This part of the plaintiff's case has not been satisfactorily proved.

[17] The plaintiff will have judgment for $5,452.10 plus the usual costs.

BARNETT T.C.J.