

CANADA / JUDGMENT

1164803 BC Ltd. v. ACME Visa Solutions Limited

2022 BCSC 273

COURT

Supreme Court of British Columbia

DECIDED

14 January 2022

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2022 BCSC 273 1164803 BC Ltd. v. ACME Visa Solutions Limited

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

1164803 BC Ltd. v. ACME Visa Solutions Limited,

2022 BCSC 273

Date: 20220114

Docket: NEW-S-S-242089

Registry: New Westminster

Between:

1164803 B.C. LTD.

Plaintiff

And

ACME Visa Solutions Limited

Defendant

Before: The Honourable Justice Branch

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

S. Alimirzaee

Counsel for the Defendant:

D. Chodha

F. Grewal

Place and Date of Trial/Hearing:

New Westminster, B.C.

January 12, 2022

Place and Date of Judgment:

New Westminster, B.C.

January 14, 2022

- [1] THE COURT: This is an application by the plaintiff landlord seeking a writ of possession requiring that the defendant tenant quit the premises defined in paragraph 2 of the factual basis of the plaintiff's application ("Premises") by at least January 28, 2022.
- [2] The defendant consented to the show cause hearing and the merits hearing occurring together, and did not dispute that the preliminary show cause test was met. Rather their submissions were devoted to the merits themselves.
- [3] Turning then to those merits, the plaintiff says that it provided notice of termination of the December 6, 2019 lease in place with the defendant ("Lease") by at least December 28, 2021. The Lease term ended on October 15, 2021, but the Lease provides that

If the Tenant shall continue to occupy the Lease Premises at the expiration of the term of this lease or any renewal period thereof with or without the consent of the landlord and without any further written agreement, the Tenant shall be a monthly Tenant at the rent herein mentioned and on the terms and conditions set out except as to the length of the tenancy.

- [4] As such, the defendant was on a month-to-month Lease at the time of the purported termination, subject to the arguments below. The termination clause in the Lease provides as follows:

The Tenant covenants and agrees that on the Landlord's becoming entitled to re-enter the Leased Premises under any of the provisions of this lease, the Landlord, in addition to all other rights, shall have the right to terminate forthwith this lease and leaving upon the Leased Premises notice of writing of its intention to do so

- [5] To the extent that there may have been procedural flaws in any earlier notices, the plaintiff says that the letter sent by plaintiff's counsel to the defendant on December 28, 2021 (the "Notice") was most assuredly adequate to satisfy the Notice requirements in the Lease.

[6] The first issue that must be addressed is whether this Notice was adequate to terminate the Lease. The defendant does not dispute that it was appropriately delivered. However, the defendant says the Notice purported to be on the basis of certain alleged breaches of the Lease and that such breaches have not been established. Absent proof of the breaches, the defendant says that the Notice is ineffective.

[7] The portion of the Notice relied upon by the defendant states:

In the event that the court finds an issue with our previous notice of termination we hereby confirm termination of the Lease by reason of the foregoing issues and make demand for immediate possession and return of all keys and other security cards or devices and expressly reserve any and all rights and remedies available to the Landlord pursuant to the terms of Lease relevant statute to common law.

[8] I note, however, that this paragraph is the second-to-last paragraph of a two-page letter. The letter begins as follows:

Further to our letters dated December 7, 2021, and emails advising 1164803 BC Ltd. (the "Landlord") that the Lease dated December 6, 2019 (the "Lease") relating to the premises located at Unit 213-12564 88 Avenue, Surrey, British Columbia, (the "Premises") termination on October 15, 2021, and the Landlord requires immediate possession.

[9] For the purposes of this application, the plaintiff does not seek to rely on the establishment of any alleged breaches. Rather the plaintiff argues that so long as notice of termination was provided in a timely fashion, there is no need for any breach to be established. The defendant agrees that if the plaintiff had simply relied on the effluxion of time the Notice would be valid, subject to the other arguments addressed below. However, the defendant suggests that the plaintiff is bound by their stated basis for termination, which was the (unestablished) breaches.

[10] I do not agree. The plaintiff did not need a reason to terminate the Lease: *Mandaville Court v. Muise*, 2008 NSSM 11 at paras. 35-39. So long as the letter serves as notice of termination, it should be treated as valid. The references to potential breaches by the plaintiff were simply redundant. Their inclusion does not invalidate the Notice completely. The Notice, when read as a whole, is certainly sufficient to advise the defendant that the plaintiff no longer wanted the Lease to continue.

[11] The next issue is whether or not the plaintiff was in a position to terminate. On this point the defendant argues that the plaintiff was not in such a position because the defendant had already exercised its option to renew the Lease for a further two years as of March 15, 2021.

[12] The Lease did provide for the potential for the tenant to exercise such a right. However, the difficulty for the defendant is that its notice of renewal was not delivered in a manner provided for in the Lease. The first point to note is that the plaintiff denies ever having received the March 15, 2021 communication from the defendant. The defendant offers no evidence that this denial is untrue. The plaintiff's own subsequent conduct is consistent with

not having received the communication. Specifically, on March 30, 2021, the plaintiff delivered a text message to the defendant inquiring about its interest in a renewal, without any mention of any earlier communication from the defendant. Given the available evidence, I accept that the plaintiff did not receive the defendant's March 15, 2021 communication.

- [13] As noted, the plaintiff did not deliver the communication in a manner set out in the Lease. The Lease provides that "all notices which may or are required to be given pursuant to this lease shall be in writing and shall be sufficiently given if delivered, or during times the post office is operating normally, mailed prepaid and registered." There is no dispute that the communication was not delivered by registered mail.
- [14] The defendant suggests that the use of the word "sufficiently" in the Notice clause means that there could be other means of providing notice. I disagree. The words preceding "sufficiently" are "shall be", implying that the condition is mandatory. Secondly, the word "sufficiently" does not necessarily imply that there are other ways in which notice may be given. Rather, the proper interpretation, particularly in the face of the use of the words "shall be", suggests that only mail delivered in that form shall be "sufficient". I also note that there is a specific clause that opens the door to the parties agreeing to other forms of notice, but the defendant does not argue that this provision is triggered here.
- [15] The benefit and need for registered mail are reflected in this very case. If the defendant's communication had been registered, then there would have been no debate about whether or not there was a delivery. The defendant would have had virtually overwhelming proof of delivery through the provision of the registration documentation provided with registered mail.
- [16] The defendant argues in the alternative that the court should grant relief from forfeiture, or alternatively, apply broader equitable principles in order to deem its notice effective, relying on *SCP 173 Dining Limited v. Costa del Sol Holdings*, 2021 BCSC 1252 at paras. 81-83; 112-114. I decline to adopt either alternative.
- [17] To the extent that both routes call for the court to consider the equities of the situation, I find that the equities weigh in favour of the plaintiff.
- a) There is no evidence that the plaintiff breached any term of the Lease.
 - b) There is evidence that the plaintiff changed its position in reliance on the lack of response to their inquiry of the defendant about possible renewal. Specifically, the plaintiff made successful efforts to negotiate the sale of the property to a buyer who expects clear title without any tenancies. Furthermore, the plaintiff provided that there were no ongoing tenancies in its property disclosure statement. Invoking the principles of equity to maintain the defendant's tenancy would potentially put the plaintiff in breach of their contractual or tort obligations to the proposed purchaser. This is not the type of difficulty that can be remedied by the defendant simply bringing its lease payments up-to-date, for example.

- c) The innocent third-party purchaser would also be potentially damaged by the court invoking equitable principles, given that it would only be able to assume possession of the property if tied to the array of obligations owed to a commercial tenant such as the defendant.
- d) Turning to the position of the defendant, they are, at least in part, the author of their own misfortune. Specifically, after receiving the text communication from the plaintiff, it should have been abundantly obvious that the plaintiff had not received the earlier communication from the defendant. It would have been a simple thing for the defendant to say to the plaintiff, "did you not receive our communication on March 15?", in which case all of these litigation complications would almost certainly have been avoided.
- e) The defendant suggests that the plaintiff does not come to court with clean hands as a result of the fact that they made allegations of breach that were not justified, and which were never made known during the tenancy. Given my finding above, the issue of the alleged breach is somewhat of a red herring in that the plaintiff does not rely upon them, and I have concluded that the plaintiff did not need to rely upon the breaches in order to justify a termination. Furthermore, in terms of the timing of raising any breaches, the Lease contains a non-waiver clause stating:

No condoning, excusing or overlooking by the Landlord of any default, breach or non-observance by the Tenant at any time or times with respect to any covenant, proviso or condition herein contained shall operate as a waiver of the Landlord's right herein with respect to any continuing or subsequent default, breach or non-observance or so as to defeat or affect in any way the rights of the Landlord herein with respect to any such continuing or subsequent default or breach and no waiver shall be inferred from or implied by anything done or omitted by the Landlord, save only an express waiver in writing.

- [18] Given all of these factors, I cannot find that there is sufficiently compelling basis to grant relief from forfeiture even assuming it is available: *Sechelt Golf and Country Club v Sechelt (District)*, 2012 BCSC 1105 at para. 128. Nor do I find a basis to evoke any broader equitable principles in order to cure the defendant's failure to provide notice of the exercise of their option for renewal in the proper manner. I conclude that the assertion of the plaintiff's strict legal rights is not unjust or unfair on the facts of this case.
- [19] Finally, the defendant sought to argue that the plaintiff had breached its contractual duty of good faith. However, even assuming that the court can rely on good faith principles to overcome express contractual provisions, which is doubtful, I do not see any breach of good faith. Insisting on the fulfillment of the black letter notice terms in the Lease is not bad faith. Raising breaches that may not be made out is not necessarily bad faith either. There is no evidence of dishonesty, lying or knowing misleading on the part of the plaintiff. There was no issue regarding the exercise of contractual discretionary powers. The Notice term has no discretionary element.

[20] Finally, I see no evidence of unreasonable contractual performance. As the Supreme Court of Canada stated in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7:

[52] Importantly, whatever variation may come with context, a contracting party -- unlike a fiduciary -- typically is not required to serve the contractual interests of the other party by duties of good faith performance .

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[73] The common law recognizes that "[c]ompetition between businesses regularly involves each business taking steps to promote itself at the expense of the other. . . . Far from prohibiting such conduct, the common law seeks to encourage and protect it" (*A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, at para. 31, citing *OBG Ltd. v. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1, at para. 142). As a general matter, good faith should not be used as a pretext for scrutinizing motive (*Bhasin*, at para. 70).

[74] Not only does this deferential approach ensure "some elbow-room" for the "aggressive pursuit of self-interest" (C. Sappideen and P. Vines, eds., *Fleming's The Law of Torts* (10th ed. 2011), at para. 30.120; see also *A.I. Enterprises*, at para. 31), but it also prevents good faith from veering into "a form of ad hoc judicial moralism or 'palm tree' justice" (*Bhasin*, at para. 70). In this context, then, courts must only ensure parties have not exercised their discretion in ways unconnected to the purposes for which the contract grants that power

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[76] With this approach in mind, I stress that what a court considers unreasonable is highly context-specific, and ultimately "depend[s] upon the intention of the parties as disclosed by their contract" (*Greenberg*, at p. 762; see also *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240, 88 B.C.L.R. (5th) 105, at paras. 63-65; G. R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at pp. 312-13). Demonstrating a breach will necessarily centre on an exercise of contractual interpretation. It is in properly interpreting the contract and the purposes for which discretion was granted that the range of good faith behaviour comes into focus and breaches can be identified

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[101] Importantly, the duty did not require Metro to subordinate its interests to those of Wastech in exercising its discretionary power in the manner that Wastech claims. The Contract purposely included no guarantee that the Target OR would be achieved. The parties were aware of the risk that the exercise of discretion represented and chose, notwithstanding long negotiations and a detailed agreement, not to constrain the discretion in the way Wastech now requests. In point of fact, Wastech is asking for an advantage for which it did not bargain. It asks, in effect, that Metro confer a benefit upon it that was not contemplated, expressly or impliedly, under the Contract. On my understanding, this stands outside of the "requirement of justice" identified by Cromwell J. in *Bhasin* (para. 64)

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[113] I note once again that the duty to exercise discretionary powers in good faith does not require a party to confer a benefit on the other party that was not a part of their original agreement, nor does it require a party to subordinate its interests to those of the other party.

[21] As such, for all of the reasons expressed above, I find that the landlord is entitled to a writ of possession effective January 28, 2022.

(SUBMISSIONS RE COSTS)

[22] THE COURT: I will give the defendant 60 days to pay costs at Schedule B.

"The Honourable Mr. Justice Branch"

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