

CANADA / JUDGMENT

Boniventure Properties Ltd. v. Eng

2021 BCSC 1716

COURT

Supreme Court of British Columbia

DECIDED

4 May 2021

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2021 BCSC 1716 Boniventure Properties Ltd. v. Eng

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Boniventure Properties Ltd. v. Eng,

2021 BCSC 1716

Date: 20210504

Docket: S211848

Registry: New Westminster

Between:

Boniventure Properties Ltd.

Petitioner

And

Edward Eng and Frank Eng

Respondents

Before: The Honourable Mr. Justice M. Taylor

Oral Reasons for Judgment

Counsel for the Petitioner:

K. Barron

The Respondent, appearing in person:

E. Eng

The Respondent, appearing in person:

F. Eng

Place and Date of Hearing:

New Westminster, B.C.

May 4, 2021

Place and Date of Judgment:

New Westminster, B.C.

May 4, 2021

[1] THE COURT: This is an application by the petitioner, Boniventure Properties Ltd., for the following orders:

1. a writ of possession for the land located at Number 4 - 228 Cayer Street, Coquitlam, British Columbia, V3J 1Y3 (the "Premises");
2. an order that the respondents, Edward Eng and Frank Eng, were tenants of the Premises for a period which expired on October 1, 2018, and have been overholding since that time;
3. an order that the respondents pay the petitioner double rent for the overholding period; and
4. costs and interest.

BACKGROUND

[2] The petitioner is the owner and landlord of the Premises. The respondents are the tenants of the Premises and have used the Premises to run a sheet steel fabrication facility.

[3] On March 22, 2012, the petitioner entered into a handwritten agreement with Canada New Fortune Investment Ltd. ("New Fortune") to rent the Premises (the "Lease"). The respondent, Mr. Edward Eng, gave evidence that he was not a shareholder, officer or director of New Fortune, which was apparently a company owned by his wife, and was dissolved in 2013. However, he also admitted that he purported to represent the company in the dealings with the petitioner concerning the Lease. In addition, I note that the evidence was that the handwritten Lease was drafted in the handwriting of the respondent Frank Eng, Edward Eng's son, and a copy of his business card was attached to the Lease document. Mr. Edward Eng also signed the Lease on behalf of New Fortune. I conclude that both respondents represented to the petitioner that they had the authority to bind New Fortune to the Lease.

[4] Paragraph 1 of the Lease stipulated that rent would be \$900 per month, plus a share of property tax and HST. Paragraph 2 stated that the Lease term would commence May 1, 2012. Paragraph 3 of the Lease stated as follows:

Lease period will be three years lease with three years option at the same terms and conditions as per the existing lease, except with increase of base rent of ___ percent.

- [5] The amount of the rent increase during the three-year option renewal period was left blank in the Lease.
- [6] There was no provision in the Lease for any further extension of the Lease after six years. Paragraph 4 stated that the formal Lease with the terms and conditions, as per attached copy, would be drawn up by the lawyer of the petitioner.
- [7] A draft typewritten lease document was in fact drawn up by counsel for the petitioner and provided to the respondents in 2012 (the "Draft Typewritten Lease"). In the Draft Typewritten Lease, the name of the tenant was modified from New Fortune to the names of the respondents, Edward Eng and Frank Eng. Both parties agreed on the evidence that the modification of the names in the Draft Typewritten Lease was following a verbal discussion where Frank Eng advised the petitioner that the Engs were the proper tenants and not New Fortune.
- [8] Upon receiving the Draft Typewritten Lease, the respondents made certain handwritten modifications and cross-outs to the Draft Typewritten Lease and thereafter met with a representative of the petitioner to discuss their proposed modifications. One of the modifications to the Draft Typewritten Lease proposed by the respondents was that the term would be for three years with two successive options to renew for three years (in other words, a nine-year term rather than the six-year term originally referenced in the Lease).
- [9] Both parties gave evidence on the petition that, during the meeting concerning the Draft Typewritten Lease, the respondents advised the petitioner that the Draft Typewritten Lease was unacceptable without their proposed changes, and the petitioner advised the respondents that their proposed modifications to the Draft Typewritten Lease were equally unacceptable. Accordingly, the parties apparently reached a stalemate in their negotiations and the Draft Typewritten Lease was never formalized or signed as between the parties. Instead, it appears that the parties were content to proceed under the original handwritten Lease, as modified verbally between the parties from time to time during the term of the Lease.
- [10] The six-year term of the Lease expired on March 21, 2018. It appears on the evidence that the parties may not have initially been aware that the Lease had expired as the respondents continued to occupy the Premises and pay rent for a few months after that date. However, on June 1, 2018, the petitioner verbally advised the respondents that it would be adjusting the rent based on the new property tax and insurance rates. The petitioner advised the respondents in writing that the amount of the new increased rent was \$1,350.60. The petitioner further advised the respondents that the rent would be increased again in the near future based upon an upcoming market appraisal over the summer.

- [11] The respondents agreed to the rent increase proposed prior to the upcoming market appraisal (without taking a position on further rent raises after the appraisal) and provided the petitioner with 12 post-dated cheques in the sum of \$1,350.60, starting from July 1, 2018, until June 30, 2019. There was no evidence that the petitioner asked for 12 post-dated cheques, nor was there evidence that the petitioner agreed that the rent of \$1,350.60 would remain unchanged for a 12-month period (as the petitioner had made it clear that the market appraisal was pending and could impact upon the rent amount over the summer).
- [12] In August 2018, the petitioner obtained a market appraisal for rent of the Premises and hand delivered notice to the respondents that rent of the Premises would be raised to \$1,628.35, including property tax, insurance and GST, commencing in October 2018.
- [13] On August 30, 2018, Frank Eng texted the petitioner stating:
- Please do not change monthly ren[t], including taxes and insurance from the amount of cheques you cashed for July, August 2018.
- [14] The petitioner responded by text on September 6, 2018:
- "Sorry, you have to pay new rent October 1st"
- [15] In September and early October 2018, the parties exchanged further text messages negotiating the issue of the proposed rent increase and related term.
- [16] During those exchanges, Frank Eng also notified the petitioner that he took the position that the nine-year term originally proposed by the respondents in the Draft Typewritten Lease had been agreed at that time and that he was prepared to pay the increased rent on the basis of extending the term for an additional three years. The petitioner refused the proposed three-year extension of term and responded by text as follows:
- No. The rent goes up October 1st or you move.
- [17] On September 17, 2018, the petitioner further reiterated the position that the rent would be increased on October 1, 2018:
- Again, I'm sorry, but the rents have gone up for all the tenants. There are no exceptions for anyone. If you do not pay the increased rent starting October 1st, you will have to move.
- [18] On September 28, 2018, the petitioner hand delivered a notice of termination to the respondents requiring them to leave by October 31, 2018. The letter was addressed to both New Fortune and the respondents. I note that the "re" line stated "month to month lease agreement."
- [19] On or about October 10, 2018, the respondents deposited \$1,350.60 directly into the petitioner's bank account and advised, by text message, that this was the rent for the month. Apparently, the respondents had access to banking software which enabled them to make a deposit in the petitioner's account even without the petitioner's permission. Since that date, the respondents have continued to pay that amount on a monthly basis, although the

petitioner has never expressly stated that it agreed to that lower amount (as opposed to the higher \$1,628.35 amount demanded in September, 2018 by the petitioner) as the appropriate rent.

[20] During October 2018, further negotiations between the petitioner and the respondents took place with respect to length of term and rent. In a text from Frank Eng to the petitioner on October 10, 2018, he stated as follows:

I have deposited \$1,356 to your account yesterday. We pay you cash for balance. I have been texting you. We never intended to fight you. We just want a long lease as we have been your tenant over six years. Just try to pay a little less as business is getting tough from our customers. As you stand firm on your demand, so we have to accept your demand without fighting. Just need confirmation on length of lease, then okay with us. Just long lease is important.

[21] He also sought to have the increased rent conditional upon a three-year extension. He stated:

No point to fight you. We'll pay what you ask if we get three years lease with three years option.

[22] The petitioner refused the three-year extension and texted the respondent in response, stating:

\$1,356 is not the correct amount. You need to deposit the balance owing. You pay or you leave.

[23] On October 15, 2018, counsel for the petitioner delivered a letter to the respondents. In that letter counsel stated that the respondents had been overholding on a monthly basis, and further stated:

In light of your long tenure at the premises, the landlord is prepared to consider a renewal of your lease. If you do not wish to renew your lease, you must vacate the premises by October 31st, 2018. We require confirmation by October 19th, 2018, if you wish to renew your lease.

[24] The letter sought an additional \$271 in rent for October, 2018. The evidence was that the additional rent was never paid by the respondents.

[25] On November 1, the petitioner texted the respondents:

Starting October 1st, 2018, the total amount for your unit number 5 is \$1,628.35. Without my consent you deposited \$1,353.60 into my account, so you owe me \$274.76 for the month of October.

[26] Since that time, the respondents have continued to occupy the Premises, but have not paid the increased rent.

- [27] On January 4, 2019, counsel for the petitioner sent an additional letter to the respondents advising that the Lease had expired and instructing them to vacate the Premises by January 15, 2019. Subsequent to that time, the petitioner has commenced legal action to remove the respondents from the Premises, but the respondents have continued to occupy the Premises and pay the lower rent of amount of \$1,350.60.
- [28] The first notice of hearing was filed by the petitioner on April 26, 2019. On October 16, 2019, the parties were ordered to schedule a full-day hearing for this petition. The hearing of the petition has subsequently been delayed due to various factors including change of legal counsel and ultimately the COVID pandemic.
- [29] Subsequent notices of hearing were filed on August 22, 2019 and March 3, 2020. By order of Master Keighley dated September 10, 2020, the petitioner was granted leave to amend the petition to replace the name New Fortune with the names of the respondents.
- [30] In the interim period, the respondents commenced a legal action against the petitioner, filing a notice of civil claim ("NOCC"), subsequently amended, wherein they alleged that the Draft Typewritten Lease, with their handwritten modifications, was a binding legal agreement, and also alleged various breaches of the Lease by the petitioner including damages arising from electricity shutdowns and the requirement that they remove some aluminum panelling from the Premises.

LEGAL ANALYSIS

- [31] At the commencement of the hearing, the respondents sought an adjournment of the application and the consolidation of the petition with the NOCC.
- [32] I denied the request for an adjournment and for the consolidation for the following reasons:
1. The respondents' materials relating to the adjournment application were filed late and not properly served in advance of the hearing. I note that the respondents had ample notice of the petition and that the petitioner had been attempting to set it down for a hearing for approximately two years. The respondents provided no adequate justification for their late filing.
 2. The respondents took the position that all the issues in this case, including issues raised on the petition, had to be resolved at a trial. In my view, this position is inconsistent with s. 18 of the Commercial Tenancy Act, R.S.B.C. 1996, c. 57 (the "Act"), which provides that a landlord may apply to the Supreme Court by petition once the Lease expires and the tenant, after written demand, refuses to leave the Premises. The Act does not require that such a petition must be adjourned if the tenant commences a civil claim, nor would such a requirement be consistent with the right of the landlord under s. 18 to proceed by petition, rather than having to proceed to trial.

3. The passage of time in this matter, two and half years since the written demand that the respondents' vacate, has already been too long. I am advised that the litigation under the NOCC has not progressed. There has been no trial date set, and the parties have apparently not even commenced the discovery process. In my view, it would not be fair to the petitioner to require it to wait, while the respondents continue to occupy the Premises, for what will no doubt be months or likely years to resolve this matter at a trial.
 4. Although the issues raised on this petition do overlap with some of the claims and material facts in the NOCC as it pertains to the legal validity of the Draft Typewritten Lease and the length of the Lease, it is not a complete overlap. To that extent, the respondents are not precluded from having their day in court at trial on the other issues raised in the NOCC, including their damages claims. I also note there were insufficient facts filed with the court to address the issues raised by the respondents in the NOCC on the merits on this petition in any event.
- [33] I now proceed to the merits of this application. As noted above, s. 18 of the Act provides that a landlord may apply to the Supreme Court by petition once the Lease expires and the tenant, after written demand, refuses to leave the Premises.
- [34] Section 19 of the Act provides that a court may appoint a date and time to inquire into a claim that a tenant is wrongfully withholding and that a landlord is entitled to possession.
- [35] Section 21 of the Act provides that the court may issue a writ to order a sheriff to place the landlord in possession of the Premises.
- [36] Section 15 of the Act provides that, where a tenant overholds and stays in the Premises after the expiry of the Lease and after a demand to vacate, the court may order double payment of the yearly rent of the land so detained.
- [37] I will turn first to the writ of possession. On this issue, I find it appropriate that a writ of possession be issued in this case, as the respondents are wrongfully overholding against the right of the petitioner, and have been since 2018. In reaching that conclusion, I have taken into account the following facts. First, the petitioner gave the respondents clear notice in October, 2018 that they would have either to pay the higher rent amount or vacate the Premises. On October 15, 2018, counsel for the petitioner delivered a letter to the respondents stating that the respondents had been overholding on a monthly basis. The letter further stated:

In light of your tenure at the premises, the landlord is prepared to consider a renewal of your lease. If you do not wish to renew your lease, you must vacate the premises by October 31st, 2018. We require confirmation by October 19 if you wish to renew your lease.

- [38] The letter sought an additional \$271 in rent, which amounted to \$1,627 in total.

- [39] It is common ground that the respondents have refused to leave the Premises and have been paying only \$1,356 in rent since October 1, 2018. Accordingly, the second remaining issue is whether the respondents had a legal right to occupy the Premises despite the demand of the petitioner that they vacate.
- [40] Under the handwritten Lease, I find that the respondents did not have any such right. The Lease expired on March 21, 2018, and the respondents had no option to renew thereafter. I do not accept the respondents' argument that their handwritten modifications to the Draft Typewritten Lease relating to a request for a nine-year term had any binding legal effect. The Draft Typewritten Lease was never signed by either party, and both parties testified on the application that they were unable to agree on the essential terms of the Draft Typewritten Lease, including the length of the term. Accordingly, there was no meeting of the minds on the amendments proposed by the respondents to the Draft Typewritten Lease. Thus, in my view, the six-year term under the handwritten Lease was the operative legal document at all material times. After the expiry of the Lease in March, 2018, the parties were thereafter operating under a month-to-month arrangement.
- [41] Further, I find that there was no oral or informal agreement whereby the petitioner and the respondents agreed that the respondents could occupy the Premises after October 31, 2018.
- [42] I have reviewed the relevant text messages and considered the affidavit evidence of the parties, and I conclude that the parties never agreed to the essential terms of a Lease extension, including failing to agree on the amount of rent or length of term.
- [43] To the contrary, the petitioner made it clear that the respondents would have to vacate the Premises unless they were willing to pay the increased rent. However, the respondents have consistently refused to pay the increased rent or to vacate the Premises despite repeated requests that they do so. As the respondents never paid the increased rent, their continued occupation of the Premises was in my view a wrongful overholding.
- [44] The respondents make a further argument that the name of the tenant on the Lease was New Fortune, and not the respondents, and accordingly that the petitioner is, therefore, proceeding against the wrong parties. I reject this argument for four reasons.
- [45] First, this argument does not on its face appear to assist the respondents. If it were true that New Fortune, and not the respondents, was the only tenant under the Lease, then it seems apparent that the respondents would have no rights at all as tenants under the Lease, to an extension or otherwise. Such rights would reside exclusively with New Fortune, which was in fact dissolved in 2013. Thus, there would in fact be no legal tenant at all under the Lease.
- [46] Second, and in any event, I find on all the facts that the parties agreed orally in 2012 to amend the Lease to reflect that the respondents were the true tenants under the Lease, and all parties have acted in accordance with that understanding for years.

- [47] Third, the notice to quit from the petitioner was addressed to both New Fortune and the respondents, so there was no issue with notice. Indeed, the evidence was clear that the respondents have been aware of this pending application for over two years.
- [48] On September 28, 2018, the petitioner hand delivered a written notice of termination to the respondents requiring them to leave by October 1, 2018. The respondents took the position at the hearing that they did not receive this notice. However, I find, based upon the flurry of text messages following that notice with the respondents seeking to negotiate the rent and the term, that they did in fact receive this notice.
- [49] Fourth, this argument was already made before Master Keighley and rejected, as he ordered that the petitioner was entitled to amend the petition to replace New Fortune with the names of the respondents. Thus, I reject this argument.
- [50] On the basis of all the foregoing evidence, my view is that a writ of possession should issue as of the date of this judgment in the form attached to the application, subject to permitting the respondents seven days from the date of this order to vacate the Premises.
- [51] Further, I order the respondents to pay the petitioner \$7,499.25, plus interest, pursuant to the Court Ordered Interest Act, R.S.B.C. 1996, c. 79, which constitutes the difference between the rent paid and the market rent levied by the petitioner pursuant to the market valuation. I find this rent payable on the basis that the petitioner made it clear since September 2018 that the respondents would have to pay \$1,628 to remain in the Premises as of October 1, 2018 and that the petitioner at no time agreed to accept the lower \$1,356 amount paid by the respondents since that time.
- [52] I now turn to the issue of the double rent. The petitioner seeks double rent for withholding pursuant to s. 15 of the Act. I find on all the facts that the payment of double rent is not appropriate under the circumstances. In *Meadowridge School Society v. Allen*, 2018 BCSC 1707 at paras. 50-53, Madam Justice Sharma reviewed the three requirements for double rent pursuant to the Act:
- 1) that the lease be for a fixed term measured in years;
 - 2) that the landlord has made a written demand for possession; and
 - 3) that the tenant remains wilfully in possession.
- [53] There is no question that the second requirement is met in this case, namely, that the landlord has made a written demand for possession. However, in my view, the petitioner has not demonstrated that the first and third requirements are met in this case.
- [54] With respect to the first requirement, a fixed term lease, I note that the facts on balance support the conclusion that at the time of the demand to vacate, the fixed term Lease had expired on March 21, 2018, and yet the petitioner continued to rent the Premises to the respondents on a month-to-month basis while they negotiated the term of a new lease.

- [55] The petitioner argued that the respondents should not be able in law to convert a fixed term Lease to a month-to-month by overholding. I agree. However, this is not that situation. In this case the evidence is that both parties appeared to be unaware that the Lease had terminated for at least two months. After having determined that the Lease had expired, the petitioner did not immediately move to evict the respondent, but instead sought to renegotiate a higher lease payment.
- [56] Indeed, the petitioner made it clear in the correspondence between the parties that it was in fact agreeable to the respondents leasing the Premises until October 31, 2018, albeit at the higher rent. Further, I note that the September 28, 2018 letter from the petitioner to the respondents requiring them to leave by October 31, 2018, had the "re" line that stated "month-to-month Lease agreement."
- [57] With respect to the third requirement, I note that the word "wilfully" has been interpreted restrictively, recognizing the punitive nature of s. 15, to require that tenants voluntarily and intentionally overhold, as opposed to overholding out of mistake or negligence. One word that has been used in the case law is the word "contumaciously", which implies a high bar: *Kenmar Inns. Ltd. v. Letroy* (1993), 86 B.C.L.R. (2d) 167 at para. 33.
- [58] In this case my view is that the petitioner has not clearly established that the respondents were acting voluntarily and intentionally. Ultimately the parties in this case shared the responsibility for failing to finalize Draft Typewritten Lease, which ultimately resulted in a significant amount of ambiguity concerning the terms and conditions applicable to any Lease renewal and rent increases.
- [59] The petitioner further contributed to the ambiguity by failing to address the issue of the renewal immediately upon termination of the Lease on March 21, 2018, by allowing the respondents to stay on the Premises on a month-to-month basis and by indicating a willingness to negotiate an extension all the way up to October of 2018. Accordingly, I am not prepared to order double rent in this case.
- [60] The petitioner, being substantially successful, will have ordinary costs of the petition fixed in the amount of \$4,000.

"M. Taylor J."

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